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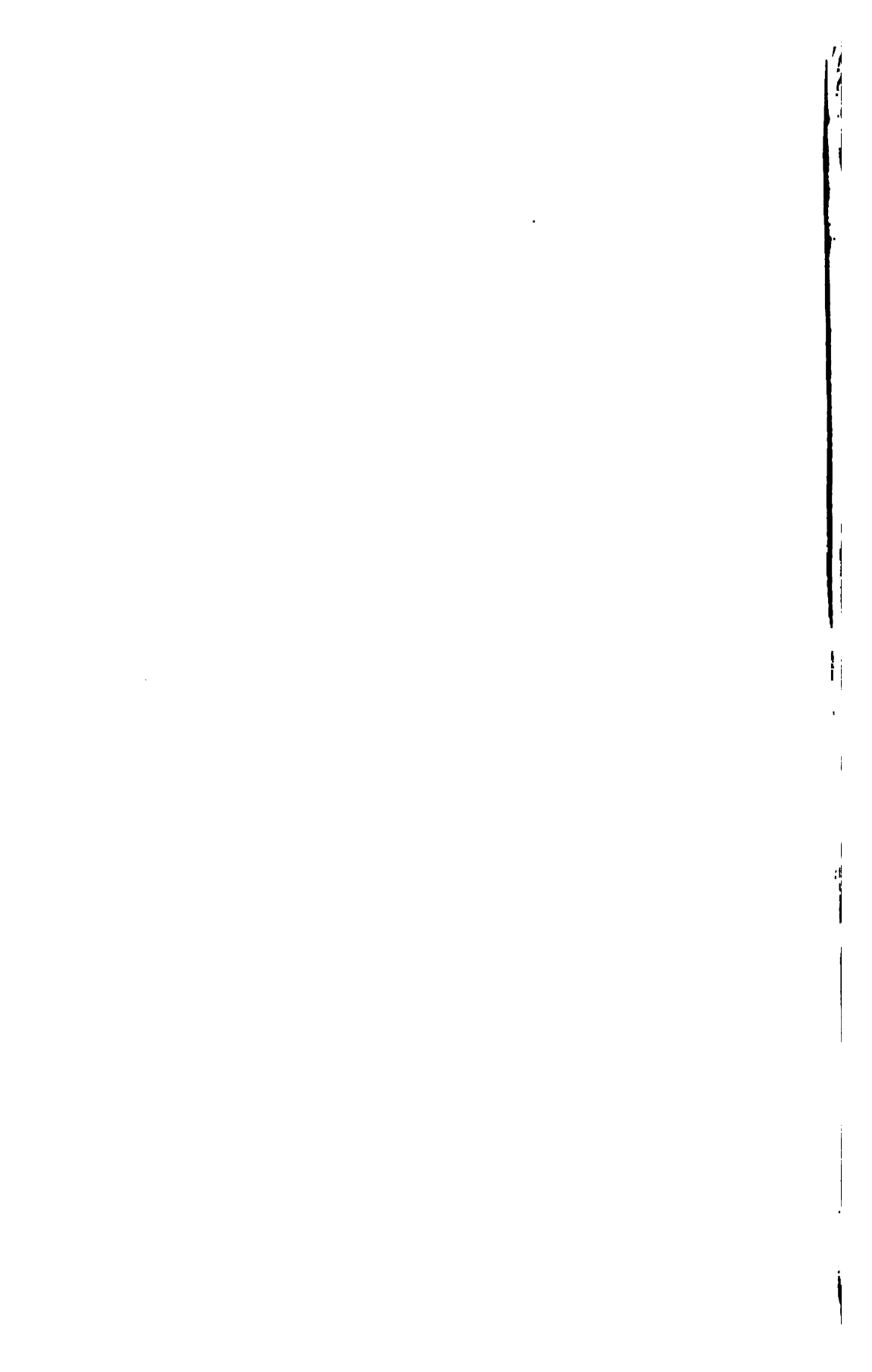
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92

June 21

REPORTS OF CASES

HEARD AND DETERMINED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

NOT REPORTED IN THE OFFICIAL SERIES.

FROM JANUARY, 1886, TO FEBRUARY, 1888.

WITH NOTES

BY

W. H. SILVERNAIL.

Vol. I

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† From January 1, 1887.

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CASES DETERMINED IN THE
COURT OF APPEALS
OF THE
STATE OF NEW YORK,

NOT REPORTED IN FULL IN THE REGULAR SERIES OF REPORTS, FROM
JANUARY 1889, WITH ANNOTATIONS.

ELIZA ANN LONGENDYKE *et al.*, Respondents, *v.* CHARLES
ANDERSON, Appellant.

Court of Appeals, January 19, 1886.

Reversing same case, 30 Hun, 220, Mem.

1. *Right of way. Easement.*—A non-continuous easement, like a right of way, will pass only by words sufficient to create a new easement, and annex it to the newly made dominant tenement, and the word "appurtenances" is not sufficient.
2. *Same*—An owner of land, if he does not intend to part with an easement in a road situate on such land, must reserve it, when conveying by a full covenant deed. After a conveyance with covenants of warranty, he cannot claim an easement in land, his entire right in which has passed by his deed; nor can his grantees claim it.

R. E. Andrews and *Joseph Hallock*, for appellant.

J. L. Warner, for respondent.

FINCH, J.—The sole question in this case is whether the plaintiffs are the owners, by a sufficient and effective grant, of a right of way over the lands owned by the defendant. The action is brought in equity, and aims to establish the right claimed, and to restrain any interference or obstruction. The course of the trial takes out of the case any title by prescription, or flowing from user, and, unless we can trace a title by grant which has passed to the plaintiffs, the judgment is wrong, and there must be a new trial. The premises of both parties are situated in what was the "Lov-

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eridge Patent," in 1686, and a portion of which became the property of Dennis and Jacobus Hegeman, who, in 1760, released to each other, and held to some extent in severalty. Jacobus conveyed to Spawn & Burger, and Dennis to Paulus Smith. The premises covered by these conveyances are shown upon a map put in evidence, which is conceded to be substantially correct. By that it appears that the tract owned by the Hegemans was nearly in the shape of a parallelogram, extending westerly from the Hudson river to what is called the "Kalckberg;" but narrow at the western end, and growing steadily wider by the spread of its northern and southern lines as the river is approached. By these conveyances Spawn & Burger, on the one hand, and Paulus Smith, on the other, became the owners of the Hegeman tract, partly in severalty, and partly as tenants in common. The principal dividing line between them ran north and south through nearly the middle of the tract; Spawn & Burger on the east and Paulus Smith on the west; and their respective premises extending entirely across the parallelogram, and so blocking Smith's access to the river, and Spawn & Burger to the Kalckberg. But these grantees took also from the Hegemans two parcels which were held by them in common, one in the northeast corner of the parallelogram, and lying on the river; and one in the southwest corner at the Kalckberg. Smith could not get to his river lot except by crossing Spawn & Burger's lot, and the latter could not get to the Kalckberg without crossing the lands of Smith; so that a way open to both parties from the river to the hill was a matter of necessity. Accordingly we find that the respective deeds reserved a right to each to cross the lands of the other by a way or road which ran from near the Canoe place on the river to the Kalckberg.

It is described as "liberty for a road in the most convenient manner," and the existing emergency renders it highly probable that such a way, substantially through the middle of the track, was established and used. By the death

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of Paulus Smith his lands passed to his son Frederick, who retained the right to the river, and was burdened with the corresponding right to the hills. Before his death, as appears by the recital in one of the deeds, Paulus Smith divided with Spawn & Burger the two lots on the river and at the Kalckberg, so that thereafter each held his position in severalty instead of in common. The two lots of Smith are numbered on the map as No. 3 and No. 6; the former lying on the hill, and the latter on the river. In 1774, Frederick Smith conveyed to Johannes Sax and Margaret, his wife, the south half of his main farm, and undivided half of No. 3 and No. 6, and at the same time conveyed to Nicholas Trumpbour, and Elizabeth, his wife, the north half of the main farm, and a moiety of No. 3 and No. 6. Both parties claim title under Frederick Smith, through these deeds; the plaintiffs under Sax, and the defendant under Trumpbour. The latter chain of title seems to be substantially complete; but in the former there is a break—no conveyance proved showing a transfer from Sax to Abram Post, from whom plaintiff's title came.

Assuming, as we deem probable, that such difficulty might be surmounted, it became important to consider whether the deed of Frederick Smith to Sax gave him any right of way over the north half conveyed to Trumpbour. The first provision relates wholly to the burden resting upon the land by reason of the right of way belonging to Spawn & Burger. In severing the land burdened, Smith evidently desired and sought to equalize the burden between his grantees; and so he provided, in each of the deeds:

“Always saving and reserving a road for Philip Spawn and Johannes Burger, their respective heirs and assigns, from the landing place at Green Island to the Kalckberg; and if one-half of the road cannot conveniently be laid on the northernmost moiety or half part, and the other half on the southernmost moiety or half part, in that case the par-

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ties holding said parts are to allow land in compensation to the parties who shall bear the greatest half of the road, so much as is above the one-half; so that it may always be understood, and it is the intent and meaning of these presents, that each half lot shall bear half the road, or allow land in compensation of the same."

It is apparent from this provision that the right of way which belonged to Spawn & Burger over the Smith lot had either not been specifically located, or was intended to be changed so as to impose equality of burden upon the several parcels. If the road ran along the line, it was merely a right of way for Spawn & Burger. Nothing else was reserved. Sax got no right upon Trumpbour's land, and the latter none upon the premises of the former. Each simply owned the fee up to his own line. If each used it, as is quite probable, it was by mutual assent or common sufferance, and not by virtue of a reservation which only recognized and provided for the right of others than themselves.

We pass now to other parts of the deed, to see if Sax acquired any interest in Trumpbour's land occupied by Spawn & Burger's easement. The conveyance adds:

"With full and free liberty to and for the said Johannes Sax, his heirs and assigns, to have a free landing to Hudson river, to erect a store-house, land goods, store wood, stack hay, and fence the same; and also to have a canoe at a place called the 'Canoe place;' * * * and also free liberty of passing and repassing at all times, into, through, and out of the said last mentioned lot No. 6, to and from the said canoe place, with horses, wagons and other carriages; and also to the like liberty of passing and repassing at all times, as well over and through lot number 5 as lot number 4 of the said division, to and from the said lot number 6 and common landing."

Recurring again to the map, we find that lots 4 and 5 were respectively the lots of Spawn & Burger. The rights thus conveyed to Sax—and the same were given to Trump-

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bour—secured to him: *First*, a landing on the river, and a right of way from that landing to lot number 6. This right was a burden only upon Spawn & Burger's land. And, *second*, the deed conveyed to Sax and Trumpbour, respectively, a right of way across lots 4 and 5 to lot 6 and the landing. This, again, conveyed the easement in Spawn & Burger's lands, lying to the eastward and between Smith and the river, and purported to give neither to Sax nor Trumpbour any right, one in the lands of the other. These deeds, it will be observed, make no mention of a right of way for either Sax or Trumpbour westward to the Kalckberg; and the reason becomes apparent when we examine the map. Sax needed no such right, for his south half adjoined No. 3, and access to his moiety of it was wholly within his own discretion. Trumpbour could reach it at the intersection where his southwest corner and the northeast corner of number 3 became identical. In so doing he would cross the corner of Sax, to which his deed gave him no right, but which might possibly be a way of necessity, and both parties could avail themselves of the right given across lots 4 and 5, without either trespassing upon the land of the other. It is difficult to see, therefore, how reserving a right of way to Spawn & Burger along the line between Sax and Trumpbour could give to either of the latter a right not granted in the land of the other. It did not pass under the word "appurtenances." Even if, at the date of their deeds, the road existed along the line which the conveyance makes somewhat improbable, the right of way would only be Spawn & Burger's, and an appurtenance of their lands. This right of way in Smith, and before severance, was in no sense an easement, since he owned the fee, and passed and repassed by virtue of his ownership. When he severed that ownership, there was no easement of his to pass. He might, indeed, create one; but a non-continuous easement, like a right of way, will pass only by words sufficient to create a new easement and

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annex it to the newly made dominant tenement, and the word "appurtenances" is not sufficient. *Parsons v. Johnson*, 68 N. Y. 66. We do not see, therefore, how Sax's deed gave him any right in the lands of Trumpbour.

We have read carefully and given much consideration to the view taken by the learned trial judge. The whole force of that argument lies in the assumption that, as to the adjoining owners, the road along the line, existing solely for the benefit of third parties, was held by such owners as tenants in common. That is untrue in point of fact. Each owned in severalty and in fee his own half of the road, and, so far as it was an easement, it belonged wholly to Spawn & Burger, to whose lands alone it was appurtenant; and Sax and Trumpbour could not be tenants in common in an easement which they did not own at all. Very probably the parties would use the road for their own convenience; but, as against each other, this would be by sufferance, and not by right of way in grant.

There is a further difficulty in the plaintiff's case. Assuming still that they held under Smith, notwithstanding the break in their chain, they took their title through a deed given to Nicholas Trumpbour, Jr., in 1807, by Abram Post, and a conveyance from the former in 1822 to the predecessor in title of the plaintiffs. But while Nicholas Trumpbour, Jr., owned the south parcel, and in 1810 he became the owner under the will of Elizabeth Trumpbour, who was the surviving grantee, in joint tenancy of Frederick Smith, of an undivided one-fourth of the north parcel, and thereupon, by a full covenant deed, without reservation or condition, conveyed all the undivided fourth part of the north parcel. If, then, he had an easement in that part of the road lying on the north parcel, he should have reserved it if he did not mean to part with it. It is difficult to see how, after this conveyance with covenants of warranty, he could still claim an easement in the land, his entire right in which passed by his deed; and if he could not claim it, his grantees could

Opinion, PER CURIAM.

not. For these reasons we feel constrained to send the case back for a retrial.

Judgment reversed; new trial granted; costs to abide the event.

All concur—ANDREWS, J., on the first ground stated in opinion—except MILLER, J., absent.

CATHARINE J. WISE, Respondent, v. THE PHCENIX FIRE INSURANCE COMPANY OF HARTFORD, CONNECTICUT, Appellant.

Court of Appeals, January 19, 1886.

Evidence. Refreshing memory.—The court may, in its discretion, permit a witness to refer to memoranda, proved to be correct both as to items and their values, for the purpose of refreshing his memory, where the items of an account or claim are numerous, and therefore difficult to be retained in the memory.

This action was brought upon a policy of fire insurance covering household furniture. Plaintiff was a witness in her own behalf to prove the loss, and was allowed, as such witness, to refer to the schedule attached to the proofs of loss, for the purpose of refreshing her memory.

Appeal from a judgment of the general term of the Supreme Court, affirming judgment in favor of plaintiff.

Chas. A. Fowler, for appellant.

Preston & Chipp, for respondent.

PER CURIAM.—There was no error in permitting the plaintiff, while under examination as a witness, to refer to the schedule attached to the proof of loss, for the purpose of

refreshing her memory. *Howard v. McDonough*, 77 N. Y. 592. This schedule, which was made up a few days after the fire, was sworn to be correct, both as to items and values, and to be made up from actual knowledge. Where the items are numerous, and therefore difficult to be retained in the memory, the court, in its discretion, may permit a reference to *memoranda* proven to be correct, both as to items and their values. To hold otherwise might make a party's rights dependent upon unusual strength of memory.

The plaintiff was subjected to an examination as to her loss in accordance with the terms of her policy, and the defendant requested a finding that, "at the time of such examination, the defendant had no knowledge that plaintiff had not, during the summer and fall of 1881, put any new furniture in her house," which was refused. The materiality of this request is taken away by the finding that the policy was not issued upon the faith of any representation by plaintiff that she had or intended to put in new furniture, and is further answered by the fact that, before the examination under the policy the defendant's agent was told by her the age and condition of all the items of furniture, and went through, with her, a discussion of the entire list.

The question raised as to the lace curtains, velvet cloak, and lambrequins, was substantially a question of fact.

We find no error in the record. The judgment should be affirmed, with costs.

All concur except MILLER, J., absent.

JONAS PHILLIPS, Appellant v. JOHN L. TAYLOR, Respondent.

Court of Appeals. January 26, 1886.

1. *Contract. Breach.*—Under a contract for prompt shipment, the seller is compelled to use reasonable diligence, and proof that he has not availed himself of existing facilities for complying with the contract, establishes a *prima facie* case authorizing an inference of culpable omission amounting to a breach of the contract.
2. *Same. Part delivery. Acceptance.*—The purchaser, in such case, is not in duty bound to reject part deliveries at the peril of being deemed to have given the vendor an indefinite extension of time for the performance of his contract.
3. *Same. Evidence. Explanation.*—In an action brought to recover, for the contract price of 56 bales of Leghorn rags, sold and delivered by plaintiff to defendant, where an agreement to sell and deliver 450 bales of rags, and a breach of such contract, are set up as a counter-claim, proof, on the part of the defendant, of a resale of the goods to other parties, and of their refusal to accept after a specified date by reason of the delay, caused by plaintiff's failure to fulfill, is competent for the sole purpose of explaining facts brought out by the plaintiff to establish a waiver as to time of performance.
4. *Trial. Charge to jury. When harmless.*—In determining whether propositions of a charge, which have been excepted to as erroneous, constitute errors for which the judgment below must be reversed, the appellate court must also consider whether the verdict could have been affected or influenced by such errors; and if the verdict was not influenced by them, the judgment will not be reversed.
5. *Same. Question for the jury.*—Where the evidence as to a waiver of the agreement to ship promptly, on the part of the defendant, is not conclusive, but conflicting, the question is properly submitted to the jury.

RAPALLO, J.—The questions in this case arise upon the counter-claim set up by the defendant, and upon which he recovered against the plaintiff. The plaintiff brought the action to recover about \$1,000 for the contract price of

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fifty-six bales of Leghorn rags, sold and delivered by him to the defendant. The defendant, by his answer, admitted the plaintiff's cause of action; but alleged, as counterclaims, two written contracts whereby the plaintiff had agreed to sell and deliver to him 450 bales of rags, and the breach by the defendant of those contracts. The jury rendered a verdict in favor of the defendant, and against the plaintiff, for \$2,865.74 in excess of the plaintiff's claim.

The case comes before us on exceptions to rulings of the judge before whom the trial was had, and to his charge to the jury; the general term having overruled such exceptions and affirmed the judgment on the verdict.

On the trial the defendant was allowed the affirmative of the issue, and put in evidence two written contracts, both dated October 29, 1879, by one of which the plaintiff, through brokers, sold to the defendant 200 bales of Leghorn cotton stripes, *for prompt sale shipment*, at 2½ cents per pound, terms cash in thirty days from delivery; and by the other of which the plaintiff sold to the defendant 250 bales cotton stripes at 2½ cents per pound *for prompt steamer shipment*, on the same terms. The contract bore marks which denoted the quality of the rags, which were to be shipped from Leghorn, Italy, to the defendant at New York. Seventy-five bales of the rags arrived per *steamer*, and were delivered and paid for December 18, 1879. Thirty-five bales, under the *said* contract, were delivered and paid for February 2, 1880. The fifty-six bales sued for arrived on the 4th and 5th of March, 1880, and were delivered, but were not paid for. Other deliveries were offered to the defendant in the latter part of March, 1880, but were refused, and the defendant notified the plaintiff in writing, on the 25th of March, that he would not accept any further delivery under the contracts unless the plaintiff would pay such damages as the defendant had sustained by reason of the plaintiff's failure to deliver within the time provided by the contracts. Of the 250 bales which the plaintiff had sold

to the defendant for prompt steamer shipment 144 bales were never delivered, and of the 200 bales sold for prompt sail shipment 140 bales were never delivered, the defendant having refused to accept any deliveries after the 25th of March; and the counterclaim is for the difference between the contract price of those rags and their market price at New York at the time when, as the defendant claims, they should have been delivered if promptly shipped from Leghorn as required by the contracts.

It was proved at the trial, on the part of the defendant, that the exportation of rags from Leghorn was a large business; that in October, 1879, when the contracts were made, orders might be sent to Leghorn by cable or by mail by way of England. It was admitted on the trial that the time by mail between New York and Leghorn was twelve days, and that the average time of passage from Leghorn to New York was, for steamers, forty days, and for sailing vessels sixty-five days. The contracts were dated and delivered October 29, 1879. On the 18th of December, 1879, seventy-five bales of the rags per steamer, and on the 2d of February, 1880, thirty-five bales of the rags under the sail contract, were delivered to the defendant at New York, and were accepted and paid for. No further deliveries were made or tendered until the 4th and 5th of March, 1880. It was alleged in the counterclaim that, at the time when the rags would have arrived in New York if plaintiff had shipped them in accordance with the terms of said contract, the market value thereof was $4\frac{1}{2}$ cents per pound, and it was further alleged therein that the defendant had made contracts for the resale of the rags to his customers. It appeared in evidence that the market price in New York advanced in November and December; that during the month of January it advanced to $4\frac{1}{2}$ cents; and that during February it was from $4\frac{1}{2}$ to $4\frac{3}{4}$ cents, and that there was no particular change until shortly after the 1st of March, 1880, when the market broke and prices fell rapidly. The de-

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defendant testified that the market broke on the 10th of March. Two deliveries under the contract appear to have been made on the 4th and 5th of March, 1880, viz.: one of twenty five bales, per sailing vessel, on the 4th of March, and one of thirty-one bales, per steamer, on the 5th of March. These deliveries were accepted, but not paid for, and it was for the price of these fifty-six bales that this action was brought.

The plaintiff, at the close of defendant's testimony, moved to dismiss the counterclaim, on the ground, among others, that the defendant had failed to prove that the plaintiff did not cause the rags to be shipped as required, or that there were opportunities for shipping them at a time earlier than they were shipped. This position is not, in our judgment, well taken. The contract was for prompt shipment. Throwing out of view the defendant's evidence as to the meaning of this term, it certainly called for the exercise of reasonable diligence. It was admitted on the trial that the length of time by mail between New York and Leghorn was twelve days, but it was also proved, on the part of the plaintiff, that in October, 1879, orders might be sent to Leghorn by cable. That this course was adopted, is apparent from the fact that the first lot delivered to the defendant, under the contract for shipment by steamer, was of seventy-five bales, which arrived by the steamer Olympia, which steamer was admitted, by stipulation upon the trial, to have sailed from Leghorn on the 8th of November, 1879. By the same stipulation it was admitted that other steamers sailed from Leghorn on the 1st, 9th, 22nd, and 27th of December, 1879, and on the 7th and 19th of January, 1880; but no further steamer shipment was made until that of thirty-one bales which arrived by the Alexandria, which steamer appears, by the same stipulation, to have sailed from Leghorn on the 29th of January, 1880. This is the shipment delivered on the 5th of March, 1880. These are the only shipments tendered, under the steamer contract, prior to the 25th of March,

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when the defendant refused to accept any further deliveries unless the plaintiff would consent that he should receive them without prejudice to his claim for actual damages sustained by the delay. Under the contract for prompt sail shipment, the first lot received was twenty-five bales by the Lloyd, which appears by the stipulation to have sailed January 1, 1880, and the second by the Consylir, which appears to have sailed January 12, 1880, though by the same stipulation it appears that between November 6, 1879, and January 1, 1880, five sailing vessels had left for New York from Leghorn, by which no shipments were made under the contract.

These facts were quite sufficient to render it incumbent upon the plaintiff to explain the great delay in making the prompt shipments contracted for, and to show why he did not avail himself of the facilities, thus apparently within his reach, to comply with his contract, or, at least, make efforts to ship by the vessel admitted to have sailed. The facts were within the knowledge of the plaintiff, rather than of the defendant, and the circumstances proved established at least a *prima facie* case authorizing an inference of culpable omission, on the part of the plaintiff, to make prompt shipments, or that, if shipments had been made, they had not been delivered to the defendant.

As a further ground for the motion for dismissing the counterclaim, the plaintiff urged that the defendant had, down to March, 1880, treated the time for the performance by the plaintiff of his contract as still open, and had estopped himself from taking a position to the contrary. The alleged estoppel is predicated on the facts that the defendant accepted the rags delivered on the 4th and 5th of March, 1880, and that up to that time he had been urging the plaintiff to fulfill his contract, and upon the further allegation that in March, 1880, the defendant had requested the plaintiff to cable to Leghorn for the residue of the rags. Although the deliveries on the fourth and fifth of March

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were late, yet the price in New York was still sustained. The defendant was not bound to reject those deliveries at the peril of being deemed to have given to the plaintiff an indefinite extension of the time for the performance of the contract. No further delivery was tendered until about the 25th of March, when the plaintiff's breach of his contract was still more clear, and the market price in New York had declined. We do not think that the acceptance of the deliveries on the 4th and 5th of March bound the defendant to accept further deliveries on and subsequent to the 25th of that month.

The allegation that in March, 1880, the defendant requested the plaintiff to cable to Leghorn for the residue of the rags called for by the contract is not sustained by the evidence, certainly not by uncontroverted evidence, which would be necessary to make it a good ground of nonsuit. The evidence, at the time the motion was made, was that some time, perhaps a week, before the 4th of March, Mr. Dedell, the broker through whom the contracts were made, informed the defendant that the plaintiff had sent, or intended to send, a cable in reference to the residue of the rags. There was no evidence that the defendant requested this cable to be sent, but on the 4th of March, 1880, the defendant sent to the plaintiff the following letter, which was received in evidence without objection :

“NEW YORK, *March*, 4, 1880.

“*Mr. James Phillips, New York*—DEAR SIR: My party has made a claim on me for \$4,550 for non-fulfillment of contract on R. C., for which I shall hold you responsible, I am trying to arrange the matter so there will be no loss to either of us. I would be pleased to hear from you as soon as you have a reply to your cable telling your party to ship balance of order by steamer at once.

“Yours, etc.,

“JOHN L. TAYLOR.”

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This letter clearly indicated to the plaintiff that the defendant regarded the contract as having been violated, and the plaintiff as being liable for the damages, and that whatever deliveries were subsequently received would be received with the view of reducing or avoiding those damages, and that no extension of time or modification of the original contract was intended.

On the 25th of March, 1880, the defendant sent the following letter to the plaintiff, confirming this position :

“ NEW YORK, *March 25, 1880.*

Mr. Jonas Phillips, New York—DEAR SIR: I return you the order for thirty-three bales R. C. on bark Agastino Repetto, as I cannot accept the thirty-three bales, nor any further delivery under our contracts of October 29, 1879, as deliveries under said contracts, unless it is understood between us that you will pay such damages as I have sustained by reason of your failure to deliver them at the time provided for in the contracts. The party to whom I had contracted to sell them refuses to receive them by reason of the long delay, and hold me responsible for the damage they have sustained. If you are willing that I should receive them without prejudice to my rights to claim actual damages incurred by the delay, then I will receive them on said terms, but not otherwise. I will exert myself to make the loss as little as possible, by the resale of the goods; or I will take this thirty-three bales and apply it on the contract for this grade for shipment in April and May. Please send me reply at once what you decide to do.

“ JOHN L. TAYLOR.”

This letter was replied to by the plaintiff on the 27th of March, as follows:

NEW YORK, *March 27, 1880.*

“ *Mr. John L. Taylor*—DEAR SIR: I am in receipt of your letter of 25th inst. and in reply beg to state that I expect you will receive the thirty-three bales R. C. rags from

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Agastino Repetto now in port, as per contract of 29th October last, as well as those to arrive, sold to you under the contract. If you object to do so, I shall sell the rags in question for your account and risk, and claim from you any damages I may suffer.

“Yours truly,

“JONAS PHILLIPS.”

The Agastino Repetto had, as appears from the stipulation, sailed from Leghorn on the 21st of January, 1880, nearly three months after the making of the contract, nine sailing vessels having left Leghorn in the meantime; and, in the absence of any explanation, it can hardly be contended that this delay was not unreasonable. The correspondence above recited shows the positions of the respective parties, and indicates that the defendant, as early as March 4th, notified the plaintiff that he regarded the contract as violated; that he had resold the goods, and that he would accept further deliveries with a view of reducing the damages; and it rebuts the idea of any waiver by the defendant of the contract for prompt shipment, or of any inducement to the plaintiff to make further shipments, by holding out that they would be accepted as a due performance of his contract.

It further appeared in the defendant's testimony, brought out by the plaintiff, that up to the beginning of March the defendant sent messages to the plaintiff, through Mr. Dedell, the broker who had negotiated the contracts, urging the plaintiff to hurry the fulfillment of his contract. The defendant testified that during all that period he was hurrying the fulfillment of the contract, not the shipment of the rags; and, on being interrogated, on his cross-examination by the plaintiff, with respect to his testimony on that subject given on a former trial of this case in regard to his messages through Dedell, he stated: “I wish to qualify that testimony in this way: that I was willing to take the

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rags as long as my party would take them from me, and that was the reason I was urging the fulfillment of the contract." On his further direct examination he said that the substance of his language to Mr. Dedell, in sending these messages, was that the party he had sold to was pressing him to deliver the rags; that they were paper manufacturers, and must have them; and his messages to the plaintiff were that he was willing to take the rags as long as his own party would take them from him, and that he would not take them if his party refused to take them. After this testimony had been introduced, and the motion for a nonsuit had been made, the court, although it had, at a previous stage of the case, excluded evidence of the defendant's resale of the goods to other parties, admitted under exceptions, proof of such resale, and of the refusal of the parties to whom the defendant had resold to receive the rags tendered after March 5th by reason of the delay, for the sole purpose of showing that the time fixed by the defendant in his messages through Dedell was limited, and he confined the effect of the evidence solely to that point. Under the peculiar circumstances of the case, and in view of the fact that the testimony was admitted for the sole purpose of explaining facts brought out by the plaintiff for the purpose of establishing a waiver as to time, we cannot say that the trial judge erred in this ruling.

More difficult questions are presented by the exceptions to the judge's charge to the jury. The contracts set up and proved by the defendant, upon which he based his counterclaim, were for the sale of 250 bales of the described quality of rags, for prompt steamer shipments from Leghorn and for 200 bales for prompt sail shipments. The defendant, in support of his counterclaim, proved, by the testimony of a witness who had been for twenty years engaged in the business of importing rags from Leghorn, that prompt steamer shipments meant fifteen days after receiving the order, and prompt sail shipments within thirty

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days. This interpretation was controverted by the plaintiff, who testified that the terms used meant within a reasonable time. On either theory, as has already been shown, the evidence required the jury to find that the time had been exceeded, and this evidence had not been controverted otherwise than by the attempt to show that the prescribed time had been waived or extended. In this condition of the evidence, the judge charged the jury, as matter of law, that when the plaintiff made a sale of goods, to be shipped promptly by steamer and by sail, he must be presumed to have had the goods on hand which he sold, and to have provided facilities to comply with his contract. These propositions were separately excepted to on the part of the plaintiff, and, as abstract propositions, we cannot sustain them. But, in determining whether they constitute errors for which the judgment below must be reversed, it is necessary to further consider whether the verdict could have been different from what it was, in respect to the subject referred to, and could have been influenced in those respects by the erroneous charge.

As to the first proposition, it was quite immaterial in this case whether or not the plaintiff had the rags on hand or not at the time he contracted to sell them. He agreed to sell them, and to ship them promptly. If he did not have them on hand at the time, he was bound, by his contract, to have them in time to ship them promptly, and his obligation to ship was the same as if they were in his possession when he entered into the contract. Saying that he must be presumed to have them on hand was a mere form of expression which did not vary his legal obligation.

The second proposition is more questionable; but, on a review of the whole case, could not have varied the verdict. Of course, it cannot be pretended that if no means of shipment from Leghorn had been shown, the contract would have bound the plaintiff to procure and send ships for the purpose. The contract, under the facts of the case, bound

the plaintiff only to avail himself of the ordinary means of shipment from Leghorn, and if he had shown that, by some misadventure or calamity, those means had been suspended, or had been so glutted with other freight that he was unable, notwithstanding due diligence on his part, to ship by them, he would have established a valid excuse for the delay, and the charge that he was presumed by his contract to have provided facilities for complying with it would have been an error for which the judgment should be reversed. But no such state of facts appeared. The evidence showed that a large number of vessels of both classes sailed from Leghorn during the time when the plaintiff might have performed his contract, and no excuse was offered on his part for not availing himself of them. On this state of the evidence the court would have been justified in charging the jury that the neglect of the plaintiff to make the shipments promptly had been established, and the charge that he was presumed by his contract to have provided facilities for the shipment added nothing to his liability on that branch of the case.

On a review of the whole case we are of opinion that the plaintiff showed no valid excuse for not having shipped the rags promptly, as required by his contracts; that the proof on the part of the plaintiff established *prima facie* that, in the ordinary course of business between the two ports, such shipments might have been made; that this evidence was not met by any proof on the part of the plaintiff; that there was no conclusive evidence of a waiver, on the part of the defendant of the agreement to ship promptly, and, in so far as the evidence on that point was conflicting, the question was submitted to the jury, and was determined by their verdict.

The judgment should be affirmed.

All concur.

E. L. DOUGHTY *et al.*, Respondents, v. the MANHATTAN
BRASS COMPANY, Appellant.

Court of Appeals, February 9, 1886.

Affirming same case, 31 Hun, 315, Mem.

Statute of frauds. Memorandum.—Where the letters, which are sent between the parties in regard to a sale of goods exceeding fifty dollars in value, are subscribed with the exception of one postscript which contains the only reference to the price, and are so connected by their contents as together to constitute a note or memorandum of sale, they amount to a sufficient compliance with the statute of frauds, and the contract is valid.

Action to recover damages for an alleged breach of a contract for the sale of a quantity of hoop-brass.

Appeal from a judgment of the general term of the supreme court, affirming judgment in favor of plaintiff.

S. B. Brownell, for appellant.

E. More, for respondent.

DANFORTH, J.—The contract upon which the plaintiff relies is contained in letters written by one or the other party, and the only question upon this appeal is whether their true construction discloses an agreement valid under the statute of frauds. 2 R. S., tit. 2, p. 2, chap. 7, § 3, sub. 1. The appellant's contention is that "the contract relied upon is not contained in any note or memorandum subscribed by the defendants;" and, as I understand the argument, it rests mainly upon the assumption that the only reference to price is contained in a postscript to defendant's letter of September 12, 1879, and that this postscript is not subscribed. The defendants were makers of brass hoops, and

the plaintiffs, as manufacturers of cedar ware, required that article. Business relations had existed between them for several years, and on the 12th of September, 1879, the defendants wrote concerning certain orders already received, giving some general information relating to the present and probable future price of brass, and duly subscribed the same. Below the signature were these words: "P. S. Will make price for November and December 17c. lb." It is plain that the signature was intended to authenticate the paper, and in such case it is immaterial upon what part it is placed, whether at the beginning, or the end, or in the middle. The postscript was an after-thought; but it was verified as effectually, for the purposes of correspondence, as if written in the body of the letter to which it was added, and into which, by reference, it may be deemed incorporated. In response to this letter, the plaintiffs, under date of September 15, 1879, gave a written order, signed by them, for "two tons of 11-16 hoop brass November 1st, two tons December 1st;" and, under date of September 17th, the defendants wrote: "Your order for November and December to hand and booked." In another written communication dated October 6, 1879, and sent to and received by the plaintiffs, the defendants said: "We will not fail to ship 1,000 lbs. per week, or more, until your order is filled."

These writings were subscribed by the defendants.

If the letter of September 12th stood alone, as containing the contract, it would be necessary to hold that it was not subscribed within the intent of the statute, *James v. Patten*, (6 N. Y. 9); but all the letters above referred to are so connected by their contents as together to constitute a note or memorandum for the sale of four tons of hoop brass, at seventeen cents per pound, to be delivered, one-half November 1st, and the other half December 1st. The proposal and final acceptance import a consent of both parties, and create an obligation on the part of the plaintiff to take and pay for the same as delivered.

It is said, however, by the learned counsel for the appellants, that the order of September 15th was indefinite, because, it did not specify the required thickness of the hoop, nor a stipulated time of payment. It is apparent, however, that earlier orders had been given, and in part filled, and the one in question called for the same article, but at a different price. If otherwise, however, there was neither ambiguity in the contract, nor any difficulty in performing it according to its terms. No term of credit was bargained for, and, although the complaint alleges that by the agreement payment was to be made on the first of the month after the goods were received, that allegation was not proved, and the question presented was simply one of variance between the complaint and proof, which the trial court might properly disregard. We think the note or memorandum sufficient to express a contract. The verdict of the jury upon evidence sufficient for their consideration establishes the breach of that contract by the defendants, and damages incurred by the plaintiff in consequence of it. We find no error, therefore, in the judgment appealed from, and think it should be affirmed.

All concur.

EDWARD W. MCGINNIS *et al.*, Appellants, v. HENRY SMYTHE, Respondent.

Court of Appeals, February 9, 1886.

Brokers. Waiver of demand for margin.—Where, in an action to recovery balance of loss on a transaction, the plaintiffs, who were brokers, after a written demand for more margin, and an interview with defendant, claimed that defendant consented that they might purchase and close the contract, but the defendant claimed that he refused to assent to this proposition, and that he was given time to think the matter over, and the plaintiffs, on the same day and without further communication with defendant, closed the contract, and charged the loss to the defendant, it was a question for the jury to determine which version was the true one, and, by finding in favor of the defendant, they found his version to be true; it was a fair inference from defendant's evidence that the plaintiffs waived their peremptory demand for more margin, and they had no right immediately, and without any further notice to, or any further demand upon, defendant, to close the contract.

John L. Logan, for appellants.

E. More, for respondent.

EARL, J.—In October 1882, plaintiffs were grain brokers in the city of New York, and in that month, as such brokers, and as the agents of the defendant, and at his request, they sold for him, and on his account, and risk, 8,000 bushels of corn, at 70 15-16 per bushel, and contracted for him to deliver the same at any time during the year 1882, at the option of the seller, and, as such brokers and agents, they thenceforth held and carried the contract for the defendant, and on his account and risk. The sale was made and the contract was held and carried under and pursuant to an agreement made between the parties on or about the 14th day of October, 1882, whereby it was provided that, in con-

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sideration of the plaintiffs' making the sale at the price above named, and holding and carrying the contract, the defendant would pay to them a commission of one-quarter of a cent on each bushel of the corn, and would, from time to time, when required so to do by them, deposit with them sufficient moneys as margin, for their protection against loss in the transaction. Pursuant to the agreement, the defendant deposited with plaintiffs, in the months of October and November, 1882, two sums, amounting to \$600, as margin, for the protection of the plaintiffs against loss in the transaction. Subsequently, by reason of the advance beyond the sum of 70 15-16 cents per bushel in the market price of corn, the margin so deposited became and was insufficient for the protection of the plaintiffs, and they were then wholly unprotected against loss in the transaction. On the 22d of November corn had advanced to about 85½ cents per bushel, and on that day plaintiff sent to the defendant this letter: "Please send us check for \$550 margin, on open deal through us in Chicago." On the same day the defendant, writing to one of the plaintiffs, acknowledged the receipt of the letter, and said:

"I take the liberty of addressing you personally, as you have some knowledge of me. I sold a boat load of corn, year delivery, and paid \$400 margin. I then paid \$200 more. You ask me for \$550 more. This I cannot spare from my business at present; but if agreeable, will give you my note for \$600, feeling that the present advance is only caused by the November shorts, and that with the heavy arrivals of corn I will be able to buy in my short, and save much, if not all, of my advances. This is the best I can do at present, and trust it will be acceptable to you."

On the next day, the 23d, the defendant called at plaintiffs' office, and had an interview with the senior member of the firm. On the trial he testified that in that interview the defendant requested him to buy the grain and cover the contract; and thereafter, on that day, the plaintiff did buy the

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grain and cover the contract at 85½ cents. There was thus a loss upon the transaction of \$1,185, and after applying the \$600 deposited by the defendant as margin, there was left a balance of \$585, and the plaintiffs brought this action to recover that sum.

Upon the evidence as given on the part of the plaintiffs, they were entitled to recover; but the defendant, testifying to the same interview of the 23d of November, denied that he assented to the purchase of the corn and the closing of the contract. He gives this account of the interview:

“ Mr. McGinnis told me he thought it was better for me to buy in that boat load of corn. He says, ‘ Mr. Smythe, there is a very, very uncertain state of affairs here. They may drive it up to a dollar a bushel. There is a syndicate hold of it, and they may drive it up. If you take my advice, you will buy that boat load in.’ It was given in the most friendly spirit to me. I said: ‘ Mr. McGinnis, I have risked so much money—I am out \$600. I am ready to put \$600 more up and take my chances, but I am thoroughly convinced before December is past, or before it happens, we will have a tumble in corn.’ He said: ‘ It may or may not. I advise you to do it.’ I said: ‘ Mr. McGinnis, I appreciate your advice, but I don’t feel inclined to spare the money from my business.’ He said: ‘ I advise you to do it. Let us help you buy it. We will take whatever ready money you can give, and we will take your note for a short date for the balance.’ I said: ‘ Mr. McGinnis, I will think it over;’ and I went out, and I never saw Mr. McGinnis after that date until yesterday.”

After this interview, on the same day, without any further communication with the defendant, the plaintiffs purchased the corn, and closed the contract, and charged the loss to the defendant.

It was a question of fact for the jury to determine whether the version of that interview given by McGinnis, or that given by the defendant, was the true one; and they found

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in favor of the defendant, and, as we must assume, found his version to be true. It is a fair inference from the evidence of the defendant that the plaintiffs waived the peremptory demand they had made upon him the day before for more margin, and that they were willing that he should take more time to consider what he would do. The jury may have found that, when he declined their advice that he should buy in the grain and cover the contract, they did not inform him that they should insist upon doing it; but that they listened to his suggestions, and assented to his proposition to think the matter over. After such an interview, they had no right immediately, and without any further notice to the defendant, or any further demand upon him, to close the contract. It follows from the views we have expressed that the requests to charge made by the plaintiffs to the court were properly refused.

No question was made at the trial as to the proof or measure of damages, and therefore, as to that, there is nothing for us to review.

The judgment should be affirmed.

All concur, except RUGER, Ch. J., dissenting, and RAPALLO, J., not voting.

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GEORGE W. LONG, Appellant, v. THE MILLERTON IRON
COMPANY, Respondent.

Court of Appeals, January 26, 1886.

Affirming same case, 30 Hun, 216, Mem.

Evidence. Vary written contract.—A written contract, which is clear and unambiguous, and contains neither patent nor latent ambiguity, embodies the agreement and speaks the language of the parties, and parol evidence is inadmissible to add to or take from the language used, and to give any other meaning to the contract than its language imports.

This was an action to recover damages for the cutting and carrying away of certain timber, and was based on a written contract of which the following is a copy :

“That the party of the first part, for and in consideration of \$2.85 for the wood for 100 bushels of coal, hereby agrees to sell to the party of the second part all the hard wood on three certain pieces described as follows : One lot known as the ‘Mill Lot,’ purchased of Henry and Ephraim Alderman, and containing 155 acres, be the same more or less ; one lot purchased of the same, containing 145 acres ; and one lying north of these lots, but adjoining, containing 200 acres, more or less, and purchased of Rufus L. Mason and Charles Taylor. The party of the second part hereby agreeing to cut sufficient wood for at least 100,000 bushels of coal per year, the year commencing April 1, 1870 ; and it is further understood and agreed by and between the parties to this instrument that the measurement of the coal shall be ascertained by the measurement of the cars, or by a coal-measuring box at the kilns. The terms of payment to be as follows, viz. : \$500 on the signing of this contract ; \$1,000 September 15th, next ; and thereafter the wood to

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be paid for once in three months, commencing April 1, 1870. Semi-annual interest on all advances to be paid by the party of the first part, and all advances to be paid back by the party of the first part, in equal amounts, quarterly from the products of the wood on the last 150 acres of land. The party of the first part having the privilege of reserving from the above-described lands logs sufficient for 100,000 feet of hardwood lumber, with the express understanding that these logs are to be marked and taken from the land no faster than the coal wood is chopped, and that they are to be cut in a manner not to interfere with the chopping of the coal wood by the parties of the second part. The party of the first part reserving 1,500 cords hard-wood from the above lands, one-half to be cut on the south end of the tract, and the balance on the north end, or where the soft timber is being cut; this clause intending to stipulate that this reservation of wood shall be at a fair average distance from the depot, and in a fair average locality as to ground and feasibility of getting the wood."

On the 3d of January, 1872, the same parties entered into another contract, of which the following is a copy :

"Whereas, George P. Holcombe, of Lebanon Springs, N. Y., and the Millerton Iron Company, of North East, N. Y., have a contract for wood or charcoal, and now wish to annul said contract, by sale and purchase outright of said wood described in said contract; now, therefore, I, the said George P. Holcombe, hereby agree to sell to the said Millerton Iron Company all the hard-wood on said tract of land as described in said contract, with the privilege of ten years to remove the wood or coal, for the sum of \$5,200, payments to be made as follows, viz: mortgages \$3,500 to be assumed by the said Millerton Iron Co., as follows: \$1,000 to Henry and Ephraim Alderman, April 1, 1872, and \$1,000, April 5, 1873, to the same parties, and the sum of \$1,500 to Charles Taylor, April 15, 1872, in all \$3,500; and the balance of \$1,700 as follows: \$250, Janu-

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ary 4, 1872; \$500 January 15, 1872; and \$950 from March 1 to March 10, 1882; or the said Millerton Iron Company may have the privilege of having the standing timber on said lots estimated, and, upon an understanding and agreement as to the number of cords of hard-wood standing on the tract being reached by the two parties, then the said Holcombe hereby agrees to discount 150 cords of wood for every 1,000 cords of wood on the tract; selling the timber standing, after said deduction is made, to the said Millerton Iron Company, for \$1.25 per cord, and giving them the privilege of ten years to remove the wood or coal; in either case the mortgages to be assumed and paid by the Millerton Iron Company, and the balance to be paid the said Holcombe, on the basis of the payments as specified above upon the terms of sale for \$5,200. The Millerton Iron Company on their part hereby agree to take the above-described wood on one of the above propositions, which proposition they accept to be made known and declared within thirty days from date, or by February 10, 1872. And it is expressly understood that any money paid the said Holcombe by the said Millerton Iron Company on and after January 4, 1872, on account of said wood shall apply on this purchase as a payment. And, in case the above purchase is completed, then the said Millerton Iron Company, within a period of one year, agree to build one more kiln at Danby, and increase their contract for coal from that point to 120,000 bushels per year, this to be done upon condition that the kilns at Danby are run to advantage."

The defendant elected to accept the first proposition contained in the last contract to wit, to pay the gross sum of \$5,200 for all the wood embraced in the contract, and such consideration was accordingly paid by defendant.

On the trial plaintiff offered to prove acts, statements and declarations of the parties at the time, and after the making of the contract, showing that the timber in litiga-

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tion was not understood by the parties to be covered by the contract. The offer was excluded on objection.

Appeal from a judgment of the general term of the supreme court, affirming judgment entered on report of the referee, dismissing the complaint.

James Lansing, for appellant.

Esek Cowen, for respondent.

EARL, J.—The only question for our consideration is whether the evidence offered and excluded by the referee should have been received. We think the second contract, which fixes the rights of the parties, is perfectly clear and unambiguous; and that, under it, the defendant acquired the right to all the hard wood upon the lands referred to therein. Under the first contract the defendant was to cut sufficient wood for at least 100,000 bushels of coal in each year, and was to pay therefor at the rate of \$2.85 for each hundred bushels of coal, and the measurement of the coal was to be ascertained by the measurement of the cars, or by a coal-measuring box at the kilns: and Holcombe reserved the lumber and cord-wood to be taken, under the circumstances and in the manner particularly specified. The new contract was intended to accomplish the purchase outright—that is, in bulk, at once and unconditionally—of all the wood described in the first contract. Now what wood was described in the first contract? Clearly all the hard-wood on the three parcels of land mentioned. Under the second contract it was optional with the defendant to take all the hard-wood at the gross sum of \$5,200, or at \$1.25 per cord, the quality to be estimated and thus ascertained by agreement. Under the first contract it was optional with Holcombe to reserve or not the lumber mentioned. Was the defendant to pay the gross sum, \$5,200, for the hard-wood, leaving it still optional with Holcombe to make the reserva-

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tion? Was it to pay the gross sum leaving Holcombe the right to reserve hard-wood worth, in the tree, \$2,500? Any reservation whatever of hard-wood is clearly in conflict with the plain language of the last contract. That must be held to embody the agreement, as it speaks the language of the parties. There is neither patent nor latent ambiguity in the contract, and parol evidence was inadmissible to add or to take from the language used, and to give any other meaning to the contract than its language imports. There is no word or phrase therein which needs any explanation.

The language of the contract also includes in the sale the sprouts or young trees. They were not excepted, and it is neither impossible nor even highly improbable that they should be included. The defendant was bargaining for all the hard-wood, and paying a gross sum therefor and within the ten years the small trees would become much larger. It is not reasonable to suppose that parties making a contract to settle all doubts and to remove all difficulties would leave a chance for dispute over the size of growing small trees. We think there is no rule of law which would justify the reception of the evidence offered. If by mistake or fraud, the written contract did not express the agreement of the parties, Holcombe should have had it reformed or corrected. As it is, it is a perfect answer to plaintiff's claim.

The judgment should be affirmed, with costs.

RUGER, Ch. J., MILLER and FINCH, JJ., concur; RAPALLO, ANDREWS and DANFORTH, JJ., dissent.

ARTHUR C. BIGELOW, Respondent, v. JAMES LEGG, Appellant.

Court of Appeals, March 26, 1886.

1. *Order denying new trial.—Not reviewable.* An order denying a motion for a new trial made upon the minutes of the judge, on the ground that the verdict was against the weight of evidence and excessive, is, so far as it depends upon the weight of evidence, not reviewable in the court of appeals.
2. *Measure of damages.*—The measure of damages for breach of contract on sale of goods by the purchaser, is the difference between the market value of the goods at the time of the breach of contract, and the price at which the purchaser agreed to take them.
3. *Same. Auction.*—The price obtained, after such breach, upon a resale, within a reasonable time, although at auction, is evidence of the market value of an article, and to be allowed such weight as the circumstances of the sale entitle it.
4. *Evidence. Sales note.*—An offer by defendant's counsel to show that a sales note, introduced by plaintiff's counsel without objection, was a mere memorandum, which, according to the custom of brokers and dealers in wool, amounted to a proposition which might be rejected or accepted by either side, and which, until rejected or accepted by both, was left open, is properly refused. The terms of the note are of no importance, unless the persons signing it were in fact the brokers or agents of the part for whom they profess to act, nor unless the contract, expressed by these terms, was one which they were authorized to make; and even in such case, no usage can control the rule of law applicable to its construction.

This action was brought to recover damages for an alleged breach of a contract of sale of a quantity of wool by plaintiff to defendants. On the trial, the principal question was as to the terms of the contract, and this the jury found in favor of plaintiff.

Appeal from judgment of the general term, affirming a

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judgment in favor of the plaintiff entered upon a verdict of a jury, and also affirming an order denying a motion for a new trial.

Mr. Thain, for appellants.

Mr. Ward, for respondent.

DANFORTH, J.—The complaint states that in January 1888, the plaintiff (doing business in Boston under the name of Arthur C. Bigelow & Co.) sold the defendants a certain lot of wool, viz., 34,388 pounds at thirty-five and a half cents per pound; that a portion of the wool was delivered to the defendants, but they refused to take the balance, to his damage, \$1,176.08. The answer of the defendants is a substantial denial of these allegations, coupled, however, with a statement that at the time referred to they looked at the wool, and made an agreement to buy of the plaintiff a certain portion, viz., thirty bags of it at the price named, and if, upon examination, that proved satisfactory, to purchase the remainder at the same price per pound; that upon examination of the wool delivered they found in it too much stuffing, or as it is explained, unwashed, unmerchantable wool, and they thereupon refused to accept it and so notified the plaintiff. They also set up that a portion of the wool received by them proved to be of an unmerchantable quality, and they returned it to the plaintiff, at the same time paying him the sum of \$1,867.84 as the full amount of the purchase-money for the wool so received, after deducting that rejected and returned.

Upon the trial of these issues evidence was given by both parties and submitted to the jury, under directions by the trial judge that from it they should determine what were the terms of the contract between the parties—whether they were as stated in the complaint, or as stated in the answer. If the former, then the defendants were bound to take the remainder of the wool; but if, on the other hand, the con-

tract was, as set up in the answer, for a sale of the thirty bags to be delivered at once, a conditional sale of the remainder, in case the thirty bags turned out good, then if they proved to be good it came to the same thing. "If not, however, then the defendants were entitled to be relieved from their contract, and were not obliged to take the rest of the wool." There was some modification of the charge upon suggestion of the defendants' counsel, and apparently it was then satisfactory to him. No point against it is presented on this appeal, nor was any claim made at the trial that the questions submitted were not warranted by the evidence, or that it was insufficient to authorize a recovery by the plaintiff. A motion, however, was made upon the minutes of the judge for a new trial, on the ground that the verdict was against the weight of evidence and excessive. It was denied. The same question is raised here by an appeal from the order. So far as it depends upon the weight of evidence, it was not reviewable in this court. *Young v. Davis*, 80 N. Y. 134; *Barrett v. Third Ave R. R. Co.* 45 id. 628.

As to the damages, the court charged the jury that, if their verdict was for the plaintiff, it should be the difference "between the market value of the wool at the time of the breach of the contract, and the price at which the defendants had agreed to take it." This is not only the general measure of damages in such cases, but no exception was taken to the charge in this respect, and it became the rule by which both parties were bound. The refusal of the defendants to take the wool was on the 12th of January. It was sold at auction on the 19th, after notice to the defendants, and the court charged that the price then realized might be taken into consideration in fixing the market value. Complaint is now made of this direction. It was not excepted to at the trial. It was proper in itself. The price obtained after such default, upon a resale, within a reasonable time, although at auction, is evidence of the market

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value of an article, and to be allowed such weight as the circumstances of the sale entitle it to. *Gill v. McNamee*, 42 N. Y. 44.

In the course of the trial the plaintiff introduced in evidence, without objection by defendants, a sales note, dated "Boston, January 10, 1883," in these words :

"Sold for account of Mess. A. C. Bigelow & Co. Boston, to Mess. James Legg & Co. Mapleville, R. I., 307, 35,000 lbs. Michigan x fleece wool. Like 30 bags shipped January 8, 1883. Wool to be handled by Mills & Coffin at 35½c. p. lb. Fare. Terms, net cash.

"MILLS & COFFIN, *Brokers*.

This note was in duplicate. A copy was sent by the brokers to each party on the day of its date. The defendants' counsel offered to show that this sales note was a mere memorandum which, according to the custom of brokers and dealers in wool, amounted to a proposition which might be accepted or rejected by either side, and which, until rejected or accepted by both, was left open. This was objected to, the objection sustained, and exception taken by the defendants. We think it cannot prevail. The terms of the note, however comprehensive, are of no importance, unless the persons signing it were in fact the brokers or agents of the party for whom they professed to act, nor unless the contract expressed by these terms was one which they were authorized to make. If that in question was of such character, no usage could control the rule of law applicable to its construction. The defendants did in fact return the note or sales contract in a letter, the words of which were also before the jury. Whether they amounted to a repudiation of the contract, or a disavowal of the authority of the brokers, was a question which might have been submitted to

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them had the defendants desired. They neither asked that nor did they raise any question as to the original employment of the brokers.

We find no error in the proceedings, and think the judgment appealed from should be affirmed.

All concur, except RAPALLO, J., absent.

JOHN CLARK, Respondent, v. THE MANHATTAN RAILWAY COMPANY, Appellant.

Court of Appeals, March 26, 1886.

Examination of witness under section 872 of the Code.—Where the testimony of a dying witness was taken and finished by a referee late on Saturday night, and it was agreed by counsel that the minutes be written up by the stenographer, and subscribed by the witness, the following Monday, and it was done accordingly in the absence of both counsel, after it had been read over to the witness, and it is not claimed that any harm or prejudice came to the plaintiff from so doing, the counsel for the plaintiff waived his right to be present, and the court, erred in suppressing it.

An application was made to suppress a deposition *de bene esse* on the ground that it was read over to and subscribed by the witness in the absence of, and without notice to the plaintiff's attorney. The defendant had the testimony of a dying witness taken by a referee under sections 876, 880 of the Code. It was completed late Saturday night and the stenographer did not write out his notes, and it was agreed, without objection on the part of plaintiff's counsel, that the minutes be written up and subscribed on the following Monday, which was done, in the absence of both counsel.

Opinion, PER CURIAM.

Appeal from an order of the general term affirming an order of the special term granting a motion to suppress the said deposition.

Edward S. Rapallo, for appellant.

Chauncey S. Truax, for respondent.

PER CURIAM.—It is not claimed that any harm or prejudice came to the plaintiff because the deposition was read to and subscribed by the witness in the absence of his counsel. We have carefully considered all the facts appearing in the affidavits, and are of opinion that plaintiff's counsel must be held to have waived his right to be present at or to have notice of the reading of the deposition to the witness on the Monday after it was taken, and that, therefore, the court erred in suppressing it. The orders of the general and special terms should be reversed, and the motion denied, with costs of the appeal to the general term and to this court, and ten dollars costs of the motion.

All concur, except RAPALLO, J., absent.

PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.*
MIGUEL CHACON, Appellant.

Court of Appeals, April 13, 1886.

1. *Evidence. Objection must be made promptly.*—Where counsel, on cross-examination, observes that the witness is not answering a question by “yes or no” when so directed, but is proceeding to give an answer which has once been stricken out, he should stop the witness and arrest the answer. He cannot lie by and speculate on the chances of first hearing what the witness will testify, and, if the testimony proves unsatisfactory, then move to strike it out. In such case, the matter generally rests in the discretion of the court, and is not reviewable.
2. *Same. Unimportant evidence.*—The refusal of the court to strike out evidence, in a criminal action, which could not have influenced the verdict, furnishes no reason for a reversal of the conviction.

The defendant was convicted of murder in the first degree.

Appeal from judgment of the general term of the supreme court, affirming judgment of conviction.

Charles S. Spencer, for appellant.

DeLancey Nicoll, for respondent,

EARL, J.—The defendant was convicted of shooting with a pistol, and thus murdering, Maria Williams, in the city of New York, on the 20th day of June, 1884. The killing is undisputed, and there was abundant evidence of premeditation and deliberation to justify the conviction. We have only to deal with exceptions taken at the trial, and but one of those, about which there was a difference of opinion among the judges composing the general term, is of sufficient importance to require special notice.

Munro Williams, the husband of the victim, was the principal witness for the prosecution. He was the only

person beside the defendant who saw the killing, and who testified to what took place at the time. He testified that he and his wife stood near each other, and that the defendant fired three shots, two at him, and one, the fatal shot, at her. Upon cross-examination by defendant's counsel, Williams was asked questions, and gave answers, as follows :

" Q. Why do you tell this jury that the two first shots were fired at you, and that that last shot was fired at this poor girl, who is dead? A. Because I was in the bedroom door, and that was the shot that struck her. Q. Have you any other reason to say that the third shot was fired at your wife except you moved your position? A. No reason more than he had threatened to kill her, and that was his only opportunity. [On motion of defendant's counsel the court struck out his answer.] Q. Now, sir, did you ever hear this man make a threat against your wife? A. Not in my presence. [On motion of defendant's counsel the court also struck out this answer.] Q. Now, I again ask you this: You have testified to this jury that the first two shots were fired at you? A. Yes, sir. Q. Now, sir, can you give to this jury any reason why they were fired at you? I ask, of your own knowledge, can you give us any reason, aside from the fact that you had stepped one side, for telling us that he fired that last shot at your wife? Yes or no? A. The only reasons I could give is that he has threatened to take her life and that was his only opportunity, and he fired at her. [The counsel for the defendant moved to strike out this answer, and the court denied the motion, and he excepted.] Q. I again ask you if you ever heard him make any such threat? A. Not in my presence. [The counsel for the defendant again moved to strike out the evidence as to the threat, and the court denied the motion, and he excepted.]"

These two exceptions are now claimed by the counsel for the defendant to have been well taken, and to point out a serious error, for which this judgment should be reversed. We think otherwise. As to the first exception, the witness

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was asked to answer the question "Yes or no," and when the defendant's counsel observed that he was not answering the question in that way, and was proceeding to give the same answer which had once been stricken out, he should have stopped the witness and arrested the answer. He could not lie by, and speculate on the chances of first hearing what the witness would testify to, and then, when he found the testimony unsatisfactory, move to strike it out. *Quin v. Lloyd*, 41 N. Y. 349. Whether the court will, under such circumstances, strike out an answer given, generally rests in its discretion, which is not reviewable. As to the second exception, the answer was fairly a response to the question. It was substantially that he had never heard the threat.

A still further answer to both of these exceptions is that the evidence was not of the least importance, and could not, in our judgment, have harmed the defendant. The defendant bought the pistol and cartridges the day before the killing. One witness testified that about two hours before the shooting, she saw the defendant load a revolver, which he had in his hand, put it in his pocket, and then go into the apartments occupied by Williams and his wife. Another witness testified that about a week before the shooting she saw the defendant have a pistol, and heard him say that he bought it to kill Mrs. Williams with. Still another witness testified that in February before the shooting he heard Mrs. Williams tell defendant that her husband, who had for some time been absent, expected to return, and he then said that if he came back he would kill both him and her. He tried to conceal himself after the shooting, and, after his arrest, said to two police officers, as they testified, that he killed her because she did not keep her promise to live with him.

The defendant, as a witness in his own behalf, however, testified that he fired the three shots at Mr. Williams in self-defense, and accidentally and unintentionally hit Mrs. Williams, and he denied the threats and confessions testi-

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fied to by the witnesses for the prosecution. The case against the defendant was so strong, and his murderous intent and his threats were so fully proven, that evidence that Williams had heard of the threats, particularly after the court had just stricken out similar evidence as hearsay, could not have influenced the verdict; and the refusal to strike out the evidence, therefore, furnishes no reason for a reversal of the conviction. Code Crim. Pro., § 542, etc.

We believe no error was committed upon the trial prejudicial to the defendant, and that the judgment should be affirmed.

All concur, except RAPALLO, J., absent.

R. CORNELL WHITE, Respondent, v. THE OLD DOMINION STEAMSHIP COMPANY, Appellant.

Court of Appeals, April 13, 1886.

1. *Question of fact.*—Where all the issues involved in the merits of the controversy are the subjects of conflicting and contradictory testimony, the court of appeals is not authorized to review the determination of the jury, though this court might have arrived, upon the evidence, if presented as an original question, at a different conclusion.
2. *Evidence. Offer.*—An offer to prove a fact, already sworn to and admitted in the case, is immaterial, and properly excluded.
3. *Same. Compromise.*—The admission of a distinct fact, which in itself tends to establish a cause of action or defense, is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice; but, if the admission is of such a nature that the court can see that it would not have been made, except to accomplish the results of the negotiation, and under an agreement, which can be fairly implied from the circumstances, that it is not to be used afterwards to the prejudice of the party making it, is not error for the court to exclude the evidence.
See note at end of case.

Opinion of the Court, by RUGER, Ch. J.

Action brought to recover damages for alleged negligence of defendant in performing a contract to tow a steamboat from Norfolk to New York.

Appeal from a judgment of the general term entered upon an order affirming a judgment in favor of plaintiff, entered upon a verdict.

R. D. Benedict and Frank D. Sturges, for appellant.

Luther R. Marsh, for respondent.

RUGER, Ch. J.—The evidence presented by the record in this case is very voluminous, having occupied the trial court nearly three weeks in its reception, and extending over a wide range of subjects, covering all the numerous issues of fact involved in the examination of questions relating to the respective negligence in the carrier of property charged with the duty of towing it upon the ocean, in the face of a storm, to a harbor or port of destination, and of the owner of such property in authorizing it to be towed, when, as it was alleged, it was in an imperfect condition, and incapable of enduring the dangers naturally to be apprehended from such a voyage. We think there was not one of the issues involved in the merits of this controversy which was not the subject of the most conflicting and contradictory testimony, and, whatever conclusion we might have arrived at upon the evidence if presented to us as an original question, we do not feel authorized to review the determination of the tribunal specially selected by law to investigate and determine such questions.

The claim is made by the appellant that as to several of the issues involved in the merits of the dispute, questions of law are presented by undisputed evidence in the case, but we are of the opinion, after a careful reading of the whole case, that this claim is unfounded, and that every such question presented upon the appellant's points was one of fact

upon which the evidence was contradictory. It would be quite a vain and unprofitable task to enter into what must necessarily be, if attempted, a lengthy discussion of the facts in the case, and which must necessarily terminate in the proposition that such questions were exclusively for the consideration of the jury, and exempted thereby from review in this court. They are, however, several questions, relating to exceptions taken to the admission and exclusion of evidence on the trial, which have been the subject of some discussion in our consultations, and which we deem it profitable briefly to refer to.

The first of these is an exception to the exclusion by the court of an offer to prove certain facts, upon the cross-examination of the plaintiff by defendant's counsel, which was rejected by the trial court upon the ground that it called for proof of an admission drawn from the party during the negotiation for a settlement of the controversy, and was therefore inadmissible. The offer was as follows: That the plaintiff "stated that he saw the customary signals up before the Rockaway was taken in tow, but that he considered it a matter of no consequence because he had seen them up repeatedly before when no storm followed." One of the acts of negligence on the part of the defendant, which the plaintiff claimed authorized a recovery of the damages occasioned to him by the loss of the Rockaway, was that of going to sea in the face of an easterly storm, after notice thereof by the cautionary signals, and we have no means of determining the fact whether the jury did not base their verdict, to some extent, upon this act of negligence, rather than others claimed to be proved. It is true that but little stress was laid upon this act in the course of the trial, and but little time was taken in the examination of witnesses upon it, but still the fact remains that the question was in the case, was left to the jury by the court, and might have been the basis of their verdict. When, however, this evidence was offered, it appeared in testimony that the plaintiff had already sworn to

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the fact that he did see the cautionary signals before the Rockaway was taken in tow, and so far as any material fact is embraced in the offer, it was to prove an admitted fact, and was therefore immaterial. It also appeared that the alleged admission was made during the course of a negotiation for a settlement, to which the plaintiff had been invited by the defendant's board of directors.

We are of the opinion that the character and substance of the things offered to be proved did not bring it within the exceptions to the rule excluding such admissions. There is no doubt but that the rule is well established in this country that the admission of a distinct fact which in itself tends to establish a cause of action or defense is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice; but if the admission is of such a nature as that the court can see it would not have been made except for the purpose of producing the objects of the negotiation, and under an agreement that could fairly be implied from the circumstances that it was not to be used afterwards to his prejudice; it is not error for the court to exclude the evidence. The rule referred to is founded upon public policy, and with a view of encouraging and facilitating the settlement of legal controversies by compromise, which object is supposed to be obstructed by the fear entertained by litigants that such a negotiation may be converted into a trap to inveigle the unwary into hazardous admissions. The law therefore excludes such admissions as appear to have been made tentatively and hypothetically, but admits those only which concede the existence of a fact. Stephens on Evidence states the rule to be that they are inadmissible "if made under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given" (page 52). Wharton's most recent work on Evidence says :

"An implied admission of liability, made a part of the negotiations for a compromise, expressly for the purpose of peace (whether such admission be made under the technical proviso 'without prejudice' or not), will not be received in evidence against the party making it when its object was merely to suggest a scheme of settlement." § (1082.)

In *Mead v. Degolyer* (16 Wend. 638), it was held that an admission by the defendant to a person employed to draw up an account between the parties, with a view to settlement, that "he had agreed to pay the plaintiff eleven dollars per 1,000 feet if he would deliver all the timber originally contracted for," was made for the purpose of effecting a settlement, inadmissible; Judge COWEN delivering a learned dissenting opinion, which was quoted from in appellant's brief. In *Hartford Bridge Co. v. Granger* (4 Conn. 142) HOSMER, C. J., says:

"The question to be considered is, what was the view and intention of the party in making the admission—whether it was to concede a fact hypothetically, in order to effect a settlement, or declare a fact really to exist."

The reason why the admission of a special fact in the course of a compromise negotiation is allowed to be proved, rests upon the obvious grounds of the improbability of a party admitting a fact going to his prejudice, intentionally or hypothetically, unless it really existed; but as to mere opinions, and loose expressions indicating the opinion of the party as to liability or exemption therefrom, they seem to come within the reasons of the rule excluding such admissions.

The admission received in *Marvin v. Richmond* (8 Denio, 58), was that of the plaintiff in the action, made upon an application by the defendant for terms of settlement. The plaintiff immediately refused to settle, saying substantially that he had no interest in the controversy, and would have nothing to do about a settlement. It is quite clear that such a declaration, made at such a time was not induced

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under the expectation that it was protected by the fact that negotiations for a compromise were pending, and that the declaration was competent for the reason that no negotiations for a settlement were in fact being prosecuted. The learned judge writing in that case gives illustrations of the character of admissions which are not protected by the rule, such as the admission of a particular item in an account consisting of a number of items. If this case is authority at all upon the question it cannot extend further than to allow proof of the admission of a specific fact made during compromise negotiations.

In *Moore v. Hitchcock* (4 Wend. 298), an admission by a party that a certain item of account, which he had never legally assumed to pay, was properly charged against him, was held to be the admission of a right, and not of a fact, and not to bind the party making it. See, also, *Murray v. Coster*, 4 Cow. 635.

In this case the rejected proof was as to the opinion entertained by the plaintiff of the validity of one of the grounds of negligence alleged by him, and it might very well be that, for the purpose of establishing a basis upon which to commence or continue the discussion of the terms of a compromise, he should be willing to narrow the points for consideration or argument by tentative admissions as to the theory of the claimed liability. We think that it was no error for the trial judge to hold, under the circumstances of this case, that the admission in question was made under an implied agreement that it was not thereafter to be used against him.

It is further urged by the appellant that it was error to allow the declarations of Captain Couch, made after the loss of the *Rockaway*, as to the cause of such loss, to be given in evidence. There is no sufficient objection to such evidence. Similar evidence to that complained of had already been given by the witness before any objection was attempted to be made. Subsequently, when the witness

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was asked, "What occurred after the loss?" a general objection of incompetency and immateriality was made, and an exception taken to the ruling admitting the question. Some unimportant testimony was then given in answer to this question, when the plaintiff's counsel again asked, "What about going into the Delaware?" No objection was made to the inquiry, and the witness then repeated what he had before testified to without objection on this subject. Even if the objection had been properly made, the repetition of evidence already in the case, unobjected to, would not have prejudiced the right of the defendant or affected the result.

Many other questions are raised by the appellant as to the admissibility and exclusion of evidence, and upon the instructions of the court, but we think, so far as there is any importance in them, they have been sufficiently and satisfactorily answered in the very careful, learned and exhaustive opinion delivered in the court below, and need no further discussion by us.

The judgment should be affirmed.

All concur, except RAPALLO, J., absent.

 POINT ON ADMISSIONS MADE DURING AN ATTEMPTED COMPROMISE.

Whether such admissions are competent or incompetent, when offered in evidence, depends upon the presence or absence of certain circumstances which are herein particularly designated.

In *Bartlett v. Tarbox*, 1 Abb. Ct. Ap. Dec., 120, an action was brought to recover the amount of four promissory notes made by defendant, all of which had been transferred to plaintiff after they were overdue. Before the transfer of the notes to plaintiff, his assignor and defendant had an interview at which they tried to settle. The assignor's account books were produced, and his account with the defendant looked over and examined. Defendant claimed against the assignor \$75 for political services, in promoting his election to the office of district attorney, and that of his brother to the office of sheriff. Defendant said that the assignor's account was all right, and he would allow it, if the assignor would allow his. These facts,

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when offered in evidence upon the trial, were objected to by the defendant upon the ground that the parties were negotiating a settlement; the objection was overruled, the evidence received, and judgment rendered for plaintiff. On appeal to the general term, it affirmed the judgment, holding that the admission of the correctness of the account was a distinct fact, which might be proved against defendant, notwithstanding it was coupled with an offer to compromise. The court of appeals held, on appeal, that the fact that parties were attempting to settle, was no ground for excluding any admission by the defendant of the correctness of the assignor's account against him. It was not an offer or proposition made for the purpose of effecting a settlement, but the declaration of a fact after looking over the item, viz.: that the assignor's account was all right. The admissions of distinct facts during negotiation for a settlement are always competent evidence against the party making them.

In *White v. The Old Dominion Steamship Co.*, reported above, an action was brought to recover damages for alleged negligence on the part of defendant in the performance of a contract to tow the hull of a steamboat from Norfolk to New York. On the trial an offer was made to show that the plaintiff stated that he saw the customary signals up before the steamboat was taken in tow, but that he considered it a matter of no consequence because he had seen them up repeatedly before when no storm followed. The court excluded the offer upon the ground that it called for proof of an admission drawn from the party during a negotiation for a settlement of the controversy, to which the plaintiff had been invited by the defendant's board of directors, and was, therefore, inadmissible. And it was held that the character and substance of the things offered to be proved did not bring them within the exceptions to the rule excluding such admission.

The rule is well established in this country that the admission of a distinct fact, which in itself tends to establish a cause of action or defense, is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice. But, if the admission is of such a nature as that the court can see that it would not have been made except for the purpose of producing the objects of the negotiation, and under an agreement that can fairly be implied from the circumstances that it was not to be used afterward to his prejudice, it is not error for the court to exclude the evidence. This rule is founded upon public policy, and with a view of encouraging and facilitating the settlement of legal controversies by compromise, which object is supposed to be obstructed by the fear entertained by litigants that such a negotiation may be converted into a trap to inveigle the unwary into hazardous admissions. Consequently, the law excludes

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such admissions as appear to have been made tentatively or hypothetically, and admits those only which concede the existence of a fact. The rule is stated by Stephens, in his work on Evidence, to be that they are inadmissible if made under circumstances from which the judge infers that the parties agreed together that evidence of it should not be given. So, Wharton states, in his recent work on evidence, that an implied admission of liability, made a part of the negotiations for a compromise, expressly for the purpose of peace, whether such compromise be made or not under the technical proviso without prejudice, will not be received in evidence against the party making it, when its object was merely to suggest a scheme of settlement. § 1082.

In *Mead v. Degolyer*, 16 Wend. 632, it was held that an admission by the defendant to a person employed to draw up an account between the parties with a view to settlement, that he had agreed to pay the plaintiff \$11 per one thousand feet, if he would deliver all the timber originally contracted for, was made for the purpose of effecting a settlement and inadmissible.

And in *Hartford Bridge Co. v. Granger*, 4 Conn. 142, the court said that the question to be considered is, what was the view and intention of the party in making the admission, whether it was to concede the fact hypothetically in order to effect a settlement, or to declare a fact really to exist.

The reason why the admission of a special fact, in the course of a compromise negotiation, is allowed to be proved, rests upon the obvious grounds of the improbability of a party admitting a fact going to his prejudice, intentionally or hypothetically, unless it really existed; but, as to mere opinions and loose expressions indicating the opinion of the party as to liability or exemption therefrom, they seem to come within the reasons of the rule excluding such admissions. *White v. The Old Dominion Steamship Co.*, *ante*.

In *Moore v. Hitchcock*, 4 Wend. 292, an admission by a party that a certain item of account which he had never legally assumed to pay was properly charged against him was held to be the admission of a right and not of a fact, and not to bind the party making it. See *Murray v. Coester*, 4 Cow. 635.

In *White v. The Old Dominion Steamship Co.*, *ante*, the rejected proof was as to the opinion entertained by the plaintiff of the validity of one of the grounds of negligence alleged by him, and it might very well be that, for the purpose of establishing a basis upon which to commence or continue the discussion of the terms of a compromise, he should be willing to narrow the points for consideration or argument by tentative admissions as to the theory of the claimed liability; and there was no error, in holding, under the circumstances of this

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case, that the admission in question was made under an implied agreement that it was not thereafter to be used against him.

In *Brice v. Bauer*, 108 N. Y. 428, defendant kept a number of dogs which were chained up day and night about his buildings or yard. One of them, a dog of a ferocious and vicious disposition, became unfastened in some way, went upon plaintiff's premises, attacked and bit him, without provocation, inflicting serious injuries. The defendant called plaintiff into his office, and a conversation occurred between them, the substance of which was as follows: defendant asked plaintiff what he was going to do about the matter and the latter said that he did not know; then defendant said, "I will give five dollars a week and pay the doctor's bill." And plaintiff declined the offer. And it was held that, in the absence of evidence that the offer was in compromise of any dispute between the parties, or of a statement that the offer was to be considered as confidential, or without prejudice, the reception of the testimony was not error. The conversation was sought by the defendant and entered upon without reservation. The disagreement was in reference only to the amount, and the transaction might well be regarded a tacit admission of liability. In such a case, even the offer of a sum by way of compromise is held to be admissible, unless stated to be confidential or made without prejudice. Where there is no caution of this kind, nor anything from which it can be inferred that the offer was made by way of sacrifice or concession for the sake of peace, or in settlement or compromise or a disputed claim, the evidence is admissible.

In *Jones v. Sparks*, 40 Hun, 639, it was held that the admission of distinct facts during a negotiation for a settlement of an account, is always competent evidence against the party admitting them, though the admissions were coupled with an offer to allow the account on a condition.

In *Townsend v. Merchants' Ins. Co.*, 45 How. 501, an action was brought upon a policy of insurance. On the trial an exception was taken, relating to the reception in evidence of an offer of compromise by defendant, upon the sole ground that it is incompetent to prove offers of settlement. The testimony was admitted as bearing upon the question of the sufficiency of the proofs of loss, which was a controverted question in the case. And it was held that, upon this point, the evidence was admissible, as the offer was not made without prejudice, or upon the faith of the success of a pending negotiation. It is only confidential overtures of pacification, and offers or propositions expressly stated to be made without prejudice, that are excluded on grounds of public policy.

In *Marvin v. Richmond*, *ante*, the admission of the plaintiff,

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made upon an application by the defendant for terms of settlement, was received in evidence. The plaintiff refused to settle, saying substantially that he had no interest in the controversy and would have nothing to do about a settlement. It is quite clear that such a declaration, made at such a time, was not induced under the expectation that it was protected by the fact that negotiations for a compromise were pending. The declaration was competent for the reason that no negotiations for a settlement were in fact being prosecuted. It was not an offer for a compromise, but an unqualified admission of a fact. This is the true distinction between such statements of a party as are admissible, and such as should be rejected on the principle that men must be allowed "to buy their peace" without prejudice. The learned judge, writing the opinion in that case, gives illustrations of the character of admissions which are not protected by the rule, such as the admissions of a particular item in an account consisting of a number of items. If this case is authority at all upon the question, it cannot extend further than to allow proof of the admission of a specific fact made during compromise negotiations.

In *Hyde v. Stone*, 7 Wend. 354, an action of conversion was brought against the defendant. Upon the latter's marriage with the mother of the plaintiff, he took into his possession all the personal property left by the plaintiff's father. And when a demand was made upon him, he admitted that most of the property had been sold or destroyed. And it was held that the declaration or admission of the defendant did not fall within the principle that propositions made with a view to a settlement or compromise, shall not be used against a party.

In *Gommersall v. Crew*, New York Common Pleas, June 2, 1890, an action was brought by a broker for his commissions. On the trial of the action the attorney for the plaintiff testified to an interview he had with one of the defendants. This interview related to an effort to compromise the matter in controversy and to save trouble. This evidence, on motion, was stricken out. And on appeal it was held that a party had a right to purchase his peace, and to make an offer of compromise for that purpose, but such offers are not evidence.

In *Payne v. Railroad Co.*, 8 J. & Sp. 8, it was held that an offer of compromise was not evidence against a party, though he had previously investigated the matters out of which the suit arose.

Statement of the Case.

THE NEW YORK AND BROOKLYN FERRY COMPANY,
Appellant, *v.* JOHN H. MOORE, Respondent.

THE NEW YORK FERRY CO., Appellant, *v.* THE SAME,
Respondent.

Court of Appeals. April 13, 1886.

1. *Reversal upon the law only.*—Where the reversal of a judgment entered upon the decision of the court is upon the law only, the court of appeals does not have to deal with the weight of the evidence, but simply to determine whether there was any evidence which authorized the findings of the essential facts.
2. *Amount of proof.*—Courts, in weighing evidence and reaching conclusions, do not deal with possibilities, but with probabilities. A mistake may be made in reaching the conclusion, but mistakes cannot be eliminated from the administration of justice by human tribunals. No more certainty in proof is required than is ordinarily practicable; and the competent proof, which will ordinarily satisfy a reasonable person, should satisfy a court, and justify its judgment.
3. *Same.*—There is no rule of law which requires a plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty as is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, provided the defendant is given the benefit of the presumption of innocence.
4. *Witness. Refusal to testify.*—The refusal of a party, in a civil action to be sworn as a witness, when confronted by a strong case of circumstantial evidence, goes far to overthrow the presumption of innocence to which he would otherwise be entitled, and which might solve a doubtful case in his favor.
5. *Witness. Credibility.*—While a court is bound to believe a disinterested, unimpeached, uncontradicted witness who gives evidence not in any way discredited, or in itself improbable or incredible, it is not bound to give credit to a witness who is interested in the result of the action, and whose evidence is improbable, and discredited by circumstances, or is against common experience and observation.

These actions, afterwards consolidated and tried together,

were brought to recover, and charge upon certain deposits and real estate of the defendant, John H. Moore, the amount of moneys alleged to have been received by him as agent of the plaintiffs, and converted to his own use by investment in such real estate, or by making such deposits of the same in his own name, or in that of his mother, in certain savings banks, which were also made defendants.

Appeal from a judgment of the general term of the supreme court, reversing judgment in favor of plaintiff entered upon the decision of the court without a jury.

W. C. De Witt, for appellants.

James M. Smith, for respondents.

EARL, J.—The New York and Brooklyn Ferry Company, a corporation, owned and operated ferries between the cities of New York and Brooklyn, from 1864 to May 1, 1879, and the New York Ferry Company, a successor to the former company, owned and operated the same ferries from the latter date to the commencement of these actions. The actions were consolidated and tried together as one action, and one judgment was entered for the joint benefit of both plaintiffs, and therefore I will speak of them in this opinion as one action.

The complaint alleges that from about the 1st day of December, 1870, to the 16th day of January, 1883, the defendant John H. Moore was employed by the plaintiff as ferry master, and that as such he received a large amount of money for tolls, which it was his duty to pay over to the plaintiff; that he had retained and converted to his use a large amount of such tolls, and had deposited the same in his own name, and in the name of his mother, in various savings banks, which were made defendants in this action; that he had also purchased certain real estate therewith, which is particularly described in the complaint; that the

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plaintiff was ignorant of the items and amounts and dispositions of the moneys so retained and converted, and judgment was demanded that the defendant John H. Moore account for the money received by him as plaintiff's ferry master, and disclose the dispositions and investments of the same; that the deposits in the savings banks and the real estate be impressed with trusts in favor of the plaintiff, and that the plaintiff should have other relief particularly specified.

John H. Moore and Margaret Moore, his mother, severally answered the complaint, putting in issue the material allegations thereof. The issues thus joined were brought to trial at a special term of the supreme court, and the court found that Moore entered the employ of plaintiff in 1866, as night watchman; that in 1867 he was made bridge-tender and gate-man, and December 1, 1870, was made ferry master, and continued in that capacity until he was discharged, January 17, 1883; that it was his duty to receive fees or tolls for teams and persons crossing plaintiff's ferries, and pay over the whole thereof to the plaintiff; that in his capacities above mentioned he collected and received large sums of money; that he did not pay over the whole thereof to the plaintiff, nor render to it a full, complete and fair statement thereof, but fraudulently retained and converted to his own use a large amount of the moneys so received for the plaintiff, amounting to at least the sum of \$22,869.68, which was deposited with other moneys in the savings banks, and invested in the real estate mentioned in the complaint, and it ordered judgment for the plaintiff, in respect of that sum, substantially according to the prayer of the complaint. The defendants, Moore, having filed exceptions to the findings and conclusions of the court, appealed to the general term, where the judgment of the special term, was reversed, and a new trial was ordered for errors of law only. The plaintiff then appealed to this court.

It is not disputed that upon the facts found the plaintiff

was entitled to the judgment given at the special term. The general term reversed the judgment on the ground that there was no evidence to warrant the findings that the plaintiffs had lost any money, or that Moore had wrongfully retained or embezzled any; and such is now the claim of Moore and his mother. As the reversal was upon the law only, we have not to deal with the weight of the evidence, but simply to determine whether there was any evidence which authorized the findings of the essential facts. It was impossible for the plaintiff to furnish any direct evidence of the precise extent of Moore's misconduct. He kept no account, and was not required to keep any, of the moneys received by him for tolls, and the plaintiff had no means of knowing how much money he received. At the end of each day it was his duty to place all the tolls received by him, together with a statement of the amount thereof, in a bag, and deliver the bag at the plaintiff's office. But it had no means of knowing whether the bag contained all the tolls collected during the day. It was able, however, to give evidence which we think fully justified the findings of the special term and the judgment there given.

Moore was born in 1841, of poor parents. For several years prior to his death, about the year 1856, his father was a day laborer, and his mother did washing for other people in the way ordinarily done by poor women. Before the death of the father his family consisted of his wife, the defendant Moore, and three young daughters, and they lived in a cheap house, where they hired three rooms. The daughters began to work at about the age of fourteen; the eldest about 1850, continuing so to do until her marriage, in 1857; the second one about 1860, continuing to do so until her marriage, in 1867; and the youngest, about 1861, continuing so to do until her death, in 1866. In 1862 the son, John H., enlisted in the army, and prior to that time the family were apparently poor, having no visible property except a small amount of cheap furniture. When John H.

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enlisted, he received a bounty, and then his mother opened a bank account in the Williamsburgh Savings Bank in the joint names of herself and her son, and deposited therein the bounty received by her son, and other money received by him, from time to time, during the war, and afterwards down to January 1, 1867, when the total deposits standing in their joint names amounted to \$699.68. After he returned from the war until he entered the employment of the plaintiff, he was hired as the driver of a truck for wages at seven dollars per week. When he applied to the plaintiff for employment, he stated that his mother was very poor; that he could not make both ends meet by the wages he was receiving as driver of the truck, and that it would be a great charity on account of his mother to give him employment. His salary while bridge-man was fifty dollars per month; while gate-man, sixty dollars per month; and while ferry master, a portion of the time seventy-five dollars, and a portion of the time eighty-five dollars, per month. Soon after entering the employment of the plaintiff he, with his mother, began to live in better style, and to deposit money with considerable regularity in different savings banks, depositing in each year, after paying all his living expenses, more than his entire salary. The result was that, at the time of his discharge from the employment of the plaintiff, he had on deposit, in six different savings banks, all in his own name, excepting two, which were in the names of himself and his mother, about \$30,000, and had invested in real estate in the city of Brooklyn \$15,350. During all this time he had no other business, and no other apparent means of making or earning any money.

Where did this considerable fortune, accumulated with successive accretions during the year he was handling the moneys of the plaintiff, come from? There is some further evidence to show. A witness gave some evidence; tending to show that he stole five dollars from the drawer in the plaintiff's ferry-house in 1873. Another witness, who was

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employed by the plaintiff to watch him, testified that in December, 1882, on three different occasions, he saw him at the close of his day's labor just before leaving the ferry-house, take bills from the money-drawer, and put them in his pocket, and then take the balance of the money and place it in the bag for return to the office of the plaintiff. Afterwards, on the 11th day of January, 1883, the treasurer of the company sent for him, and asked him to explain how he came by so much real estate, and whether he kept any savings bank book or account, and he stated that he had purchased the real estate with his savings, and that he never had any bank account or savings bank book, and made other false statements. Afterwards, on the 17th of January, when police officers attempted to arrest him upon a warrant charging him with crime against the plaintiff, he apparently attempted to run away from the officers, probably to get into his house before they could arrest him, and after his arrest, before he could get into his house, he offered to give the police officers \$500 if they would let him go into his house for one minute. After his arrest he was searched, and there was found in one of his pockets four savings bank books, representing about \$9,000 of deposits. It is a reasonable inference that he desired to get into his house to conceal the bank-books, so that they should not reveal his large deposits. After the discharge of Moore from the employment of the plaintiff, his successor in the office of ferry master returned to the company for the succeeding month much more toll money than Moore did for the corresponding period of the preceding year, although there was no apparent reason for a larger receipt of tolls. With all these facts pressing upon him and calling in question his integrity, Moore did not offer himself as a witness on his own behalf, although opportunity was offered him to be sworn and testify.

This evidence, so far as it tends to show a misappropriation by Moore of plaintiff's money, is mainly circumstantial. Some of the circumstances are not very strong, and stand-

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ing alone, would be quite inconclusive and insufficient as the basis for any judgment. But they all point in one direction, and combined they furnish great probative force. They do not exclude every hypothesis but that of Moore's wrong-doing; but they all harmonize with that of his guilt. His innocence may be possible. But courts, in weighing evidence and reaching conclusions, do not deal with possibilities, but with probabilities. It may be that in reaching a conclusion adverse to Moore, a mistake has been made; but mistakes cannot be eliminated from the administration of justice by human tribunals. No more certainty in proof should be required than is ordinarily practicable. In civil trials the party having the affirmative must make out his case by a preponderance of evidence. The competent proof which would ordinarily satisfy a reasonable person should satisfy a court, and justify its judgment. In this case it is not for us to determine how satisfactory plaintiff's evidence was, but whether there was any evidence to sustain the judgment. That there was some, and sufficient, we have no doubt. Moore received a large amount of money for the plaintiff—how much, cannot be shown with precision. It called upon him to account for the money. He rendered no account, and made no satisfactory statement. He deposited a portion of the money in plaintiff's office, and the evidence renders it highly probable that he deposited the balance in savings banks for his own use. Its loss may be measured, to some extent, by his otherwise unaccountable gains. The case against him is not one merely of suspicion but of great probability.

There is no rule of law which requires the plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty which is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, always giving the defendant the benefit of the presumption of innocence. Where a judgment for the

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plaintiff involves crime or a moral turpitude on the part of the defendant, the court should always require satisfactory proof, and when that has been given judgment should follow regardless of consequences. In no other way can the law be properly administered, and private rights effectually protected. Moore, having occupied a confidential relation with the plaintiff, and received a large amount of money for it, of which it had no account and no precise knowledge, when called upon in reference to the money so received, should at least have been frank and truthful, and have given the best account he could. His refusal to be sworn as a witness when confronted with plaintiff's evidence goes far under the circumstances of this case, to overthrow the presumption of innocence to which he would otherwise be entitled and which might solve a doubtful case in his favor.

We have thus far brought into view only the evidence given on the part of the plaintiff, and have yet to notice that relied on by the defendants. Moore's account of his great accumulation of property is that a large share of it was given to him by his mother, and she is produced as a witness to prove it. Her story is as follows: She and her husband came to this country from Ireland in 1836, bringing with them 500 guineas. It does not appear what was done with this money, and it is not claimed that it was ever deposited in bank or invested. She kept boarders for about thirteen years, and during a portion of the same time a retail liquor store. Her husband for several years bought and sold cattle and hogs, and butchered them, and in these kinds of business they made money, which was kept by her. All these kinds of business terminated before 1853. After that her husband, who sometimes indulged in too much drink, worked until his death, in 1856, in a distillery as a day laborer for twelve dollars per week. What her children earned was brought to her and saved, although prior to 1856 it is certain from their ages that they could have earned but very little. In 1856, when her husband died, she had accumu-

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lated in this way \$15,000, ten or twelve thousand of which was in bank bills and the balance in gold.

This money was all accumulated prior to 1854, and, as it was accumulated, was put and kept in a wooden chest under or behind her bed. It does not appear that any member of her family knew that she had this money, and no other witness is produced who ever saw it or heard of it. She kept this large sum of money in that chest, unknown to any one, until 1870. During all that time she lived in poverty, and she continued to do washing for other people until three years before the trial of this action, when she was seventy-six years old. She did not deposit the money in savings banks for fear she might lose it, although she lived near the Williamsburgh Savings Bank, and knew it was a very strong bank with an immense surplus. Although she was afraid to deposit the money in banks, she kept the bank-bills—most of them for twenty years—in a frail wooden box, through the financial crisis of 1857, and until long after such bills had gone out of circulation and been supplanted by the national currency, and the state banks had ceased to do business. She kept the gold notwithstanding the enormous premiums which it had reached until the premium had been mostly swept away. While she distrusted the banks for her own money, she was careful to deposit the money earned by her son before he entered the employment of the plaintiff, from time to time as he earned it, in a savings bank. Although she kept this money so long—some of it certainly thirty years—in 1870 she began to dole it out to her son, at first in small sums, and then in larger sums, until she had given all of it to him. She suddenly, in 1870 acquired confidence in banks and in her son, and began to dispose of the hoarding of many years, and still took in washing to earn money. It is also a singular coincidence that she began to swell her son's bank account at the same time when the complaint charges that he began to embezzle the moneys of the plaintiff.

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Such is her story, uncorroborated in a single essential particular. It is against common experience and observation. It is possible that it is true, but it is highly improbable. It is extraordinary and incredible, and certainly the trial court was not bound to believe it. While a court is bound to believe a disinterested, unimpeached, uncontradicted witness who gives evidence not in any way discredited, or in itself improbable or incredible, it is not bound to give credit to a witness who is interested in the result of the action, and whose evidence is improbable, and discredited by circumstances, or is against common experience and observation. Here Mrs. Moore was interested, and it is enough for us to say that her evidence was of such a character that no court was bound in law to believe it, and the case is thus left to stand upon the plaintiff's evidence.

We see no reason to believe that the trial court committed any error to the prejudice of the defendants, in the amount awarded to the plaintiff. We are, therefore, of opinion that the order of the general term should be reversed, and the judgment of the special term affirmed, with costs.

All concur, except RAPALLO, J., absent.

Opinion of the Court, by FINCH, J.

JOSEPH EMRICH, Appellant, v. LUCY E. WHITE, Respondent.

Court of Appeals, April 13, 1886.

Specific performance.—Where a vendee agrees to purchase real estate of the vendor, with knowledge that the latter holds it under a will subject to the testator's undischarged debts, and to take a deed of bargain and sale, with covenant against the vendor's own acts, by reason of which the price to be paid is seriously reduced, the plaintiff, on refusal to accept such deed when tendered, is put in default, and cannot maintain an action for specific performance, or ask compensation for defect of title, though a subsequent stipulation was entered into, that the vendee might reject the deed, and if he did so, and the vendor chose to sue him for the purchase money, and succeeded in the action, the interest was to be waived until the date of the decision.

Action brought to compel a specific performance of a contract of sale of certain real estate.

Appeal from a judgment of the general term, entered upon an order affirming a judgment rendered at special term dismissing the complaint.

Samuel Untermeyer, for appellant, Joseph Emrich.

Eliel F. Hall, for respondent, Lucy E. White.

FINCH, J.—The parties to this action entered into a contract for the sale and purchase of real estate, by the terms of which the plaintiff was to pay therefor the sum of \$9,000 by assuming an outstanding incumbrance of \$3,000 and paying the balance in cash; the deed to be delivered, and the contract performed, on the ensuing twentieth day of July, at a place named. Before the contract was signed the character of defendant's title was fully explained. The plaintiff was informed that she took as devisee under the

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will of John H. White, by a provision in the following terms, viz.:

“After all my lawful debts are paid and discharged, I give, devise and bequeath all my estate, real, personal, and mixed, to my beloved wife, Lucy E. White, for her sole use, benefit, and behoof, forever.”

The plaintiff was further informed that the personal estate of the testator had proved insufficient to pay his debts, and that these, to a very serious amount, remained undischarged, and for this reason the defendant's counsel, who conducted the negotiations, while expressing his belief that the title would be good, declined to agree to give general covenants of warranty, and bound his client only to give a deed of bargain and sale, with covenant against her own acts, and in that form, and after such full explanation, the contract was signed. It would seem, therefore, that the agreement contemplated a sale and purchase of the title which the defendant in fact possessed, and clouded by a possible defect, on account of which the price to be paid was seriously reduced; unless that inference is modified by the further stipulations signed on the same day, but after the execution of the contract. These apparently contemplated that, on the day for consummating the agreement, the plaintiff might accept the deed tendered, or conclude to reject it, though his right to do so was not conceded, but denied. If he did reject the deed, and if thereupon the defendant chose to sue for the purchase money, which was left to her free choice, then, if she succeeded in the action, interest on the agreed purchase money was to be waived until the date of that decision; but if the plaintiff succeeded he was nevertheless to pay the taxes of 1880, and all assessments becoming a lien after the date of the contract. These stipulations indicate a difference of opinion as to the legal effect of the contract signed, which might end in a litigation with an unknown result, but nothing in them changed the legal effect of that contract as it stood, or the rights of the parties

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under it. They related wholly to the emergency of a suit which might possibly be brought, but which the defendant was under no obligation to bring.

On this state of facts the courts below have held that plaintiff's refusal to accept the deed tendered put him in default, and that he could not maintain the present action to compel a specific performance with compensation for the defect in the title. In answer to this the plaintiff contends that his rejection of the deed was purely formal, and made to enable the defendant to bring the action referred to in the stipulation. But very little in the case supports that contention. The complaint makes no such claim. On the contrary, it alleges explicitly that the plaintiff rejected the offered deed upon the ground of a defect in the title, and there is nothing in the stipulation which affected his duty to perform his contract, or refuse to do so at his peril, and of his own sole choice. It is then said that the demand of the purchase price as \$9,000 was too much. If a demand was needed, it was sufficient. Nobody could or did misunderstand it. The defendant did not say or mean that \$9,000 should be paid in cash, but that it should be paid as required by the contract. The criticism is purely technical, and has no merit in it.

The further contention is made that performance at the day was waived by, after negotiations. Such negotiations did take place, but they consisted of repeated efforts on the part of defendant's counsel to induce the plaintiff to perform, which he steadily refused, until the effort ended by a notice, on the 2d of September, that defendant would give but two or three days for a final answer, and then, after waiting a week, with no reply, the defendant's counsel formally closed the door by demanding the cancellation of the contract. Two days after that this action was brought for a specific performance of the contract which the plaintiff had steadily repudiated, and refused to perform. Whatever may be his remedy at law, if upon the facts he can have any, it is certain

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that he is not entitled to the intervention of equity, and shows no reason why an action at law for damages would not afford him adequate redress. The plaintiff declares in his brief that he is now, and was, at the time of the trial, willing to accept the title as it stands. He should have reached that conclusion sooner. After bringing this action to obtain compensation for its defects, and steadily refusing to accept the deed until time has perhaps cured all imperfections, he cannot equitably ask that his default be ignored, and that he be allowed to have a good title for the price of a defective one.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

JAMES MACLAREN, Respondent, v. EMELINE A. PERCIVAL
Appellant.

Court of Appeals, April 27, 1886.

Mortgage. Consideration.—A mortgage executed by a wife upon her own real property, and delivered by her to her husband, who used it as collateral security to procure an extension of time on certain notes given by his firm, is based upon a sufficient consideration, and is valid, in the absence of proof that the mortgage was diverted from the purpose for which it was intended.

Action brought to foreclose a mortgage executed by Daniel G. Percival, and Emeline A. his wife, upon real estate owned by the latter.

Appeal from a judgment of the general term of the supreme court, reversing judgment for defendant entered on the report of a referee.

James Spencer, for appellant, Emeline A. Percival.

Opinion, PER CURIAM.

J. Sanford Potter, for respondent, James Maclaren.

PER CURIAM.—The appellant claims that there was no consideration for the mortgage in question, and relies upon the evidence, which shows that the defendant had no knowledge of the purpose and object of the mortgage at the time of its execution, and that the mortgage was delivered as collateral security for the payment of a past indebtedness. Appellant further claims that she was a mere guarantor, and that a contract of guaranty must be supported by a sufficient consideration. The respondent's counsel insists that the consideration was the extension of the time of payment, on the day of the receipt of the mortgage, upon three of the fifteen notes which had been given by the firm of which defendant's husband was a partner. The referee found that these notes were made and delivered on the 16th of October, 1878. The evidence shows a receipt of these notes, bearing date of the 28th of December, 1878, signed by the plaintiff; and just preceding the signature was a memorandum to the effect that the time of the payment of the three notes was extended. It would thus seem that the time of payment was extended on the date of the receipt, and of the giving of the mortgage, and the proof shows that the extension was given upon the execution and delivery of the mortgage. Another instrument attached to the said receipt shows a large indebtedness to the plaintiff at the time, and that the mortgage was received as collateral security for the payment of the notes named. The two writings must be read together as forming one agreement, and may be interpreted as containing a recital that the time was extended in consideration of the collaterals mentioned in the last receipt, which was annexed. This was a good consideration for the execution of the mortgage. The creditor was to be benefited, and the debtor placed to some inconvenience, by the extension of the time of payment of the three notes. This question, however, is fully discussed in the opinion of the general term by

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LEARNED, J., and therefore it is not necessary to enlarge upon the subject.

There was no proof that the mortgage was diverted from the purpose for which it was intended. The defendant was not told the purpose for which it was to be used, and hence it could not have been used for a different purpose than that for which she was told it was intended. There is no ground for claiming that there was no valid or legal delivery of the mortgage to the plaintiff. The defendant allowed her husband to take it, evidently to do with it as he pleased, and he had a right to deliver it to the payee named therein for the purpose for which it was executed.

The presumption is that the notes, for which the mortgage was executed as collateral, had not been paid, and the burden of proof was on the defendant to show otherwise, if such was the fact.

The order of the general term should be affirmed, and judgment ordered for the plaintiff, upon the stipulation, with costs.

All concur.

POLYDORE DUCLOS, Respondent, v. WILLIAM T. CUNNINGHAM, Appellant.

Court of Appeals, April 30, 1886.

Affirming 33 Hun, 667, Mem.

1. *Brokers. When entitled to commissions.*—When a broker, employed to effect a sale, has found a purchaser willing to take upon the terms named, and of sufficient responsibility, he has performed his contract, and is entitled to the commissions agreed upon.
2. *Same. Waiver.*—Even if ordinarily a broker is required to furnish the name of the purchaser as a condition precedent to his right to claim commissions on the sale, the vendor, if he interposes no objection on that ground, but absolutely disavows the sale, waives the right to insist upon any such condition.

Opinion, PER CURIAM.

Action to recover commissions alleged to have been earned by plaintiff as defendant's broker, in effecting a sale of a quantity of prunes.

Appeal from a judgment of the general term of the supreme court.

Edward Souther, for appellant.

James M. Smith, for respondent.

PER CURIAM.—There was a conflict in the evidence in regard to the contract between the plaintiff and the defendant as to the time when the plaintiff had a right to sell the prunes for the price named as agreed upon. The plaintiff testified that he was authorized to sell the prunes at seven cents per pound on a credit of sixty days, without regard to the time of sale. The defendant, with whom the contract was made, swears that the price fixed at the time of the conversation and agreement was for the day only when the conversation took place between himself and the plaintiff as to the sale. The sale was made by the plaintiff on the following day, at the price named, to responsible buyers. On being advised thereof defendants repudiated the contract on the ground that the plaintiff had no authority to sell at any other time than on the day when the contract was entered into, stating that they were not sellers on the day of the sale under seven and three-quarter cents. The defendants insist that, the telegram sent by the plaintiff to them as to the sale not having stated the name of the purchaser, the minds of the parties did not meet, and no valid contract was made which was binding on the parties.

We think there is no force in this position. No such objection was taken at the time by the defendants, and, had it been, the difficulty, no doubt, would have been obviated at once by the plaintiff disclosing the name of the purchaser.

Even if ordinarily a broker is required to furnish the name of the purchaser as a condition precedent to his right to claim commissions on the sale, as the defendants interposed no objection on that ground, and absolutely disavowed the sale, they waived the right to insist upon any such condition. The rule, no doubt, is that when a broker, employed to effect a sale, has found a purchaser willing to take upon the terms named, and of sufficient responsibility, he has performed his contract, and is entitled to the commissions agreed upon, and the rule claimed, that the minds of the parties did not meet, has no application.

The appellants' rely upon the letters written by the plaintiff after the telegram was sent, and insist that they are an admission that all his efforts have been unsuccessful, and they claim that the broker was not entitled to commissions for unsuccessful efforts. The letters referred to were sufficiently explained by the oral testimony given by the plaintiff; and, as the evidence stood, it was a question for the jury to determine the effect to be given to the letters in question, in connection with the other evidence introduced upon the trial.

The general term opinion fully covers all the questions presented. The judgment should be affirmed.

All concur.

70 SERAT v. UTICA, ITHACA & ELMIRA R'Y CO.

Opinion of the Court, by DANFORTH, J.

MORTIMER E. SERAT, Respondent, v. THE UTICA, ITHACA
AND ELMIRA RAILWAY COMPANY, Appellant.

Court of Appeals, April 30, 1886.

Affirming 32 Hun, 642, Mem.

Conversion. Sale of property.—Where a firm, of which plaintiff was a member, erected a certain trestle-work for the unloading and distribution of coal, under an agreement with the defendant, but on the condition that the materials used in the construction were to remain at all times the personal property of such firm, and the defendant thereafter wrongfully took possession of the materials and trestle-work and converted them to its own use, the plaintiff, to whom his partners had conveyed their interest in the material used in the trestle-work, can, after demand, maintain an action to recover the value of the same. The defendant's wrongful act in taking possession of the property did not transfer the title thereof from the firm to it, nor operate as an excuse for its failure to surrender the property when demanded. The property, by the conveyance from plaintiff's partners to himself, cease to be a partnership asset as against the defendant.

Appeal from a judgment of the general term of the supreme court in favor of plaintiff.

Brown & Armstrong, for appellant, Utica, I. and E. R'y Co.

Smith & Robertson, for respondent, Mortimer E. Serat.

DANFORTH, J.—The plaintiff sought in this action to recover damages for the conversion by the defendant of certain trestle-work constructed for the unloading and distribution of coal. The answer put in issue the material allegations of the complaint. The trial court found, upon evidence to the sufficiency of which no objection is made, that prior to the month of January, 1883, a copartnership

existed between the plaintiff, Swift, and Seth Serat, under the name of the Valley Coal Company; that it constructed a trestle-work in pursuance of a contract between the firm, the defendant, and a certain other railway company, but upon such conditions that the materials used in the construction of the trestle-work remained at all times the personal property of the firm, with the right to remove the same at any time; that in January, 1883, the defendant wrongfully took possession of the materials and trestle-work, and converted them to its own use; that afterwards, on the tenth day of July, 1883, two of the copartners, Seth Serat and Swift, assigned and transferred to the plaintiff their right, title, and interest in the material and timber used in said trestle-work, and afterwards, before the commencement of this action, and on the twelfth of July, 1883, the plaintiff demanded of the defendant the trestle-work and materials, and the possession of the same; that the defendant refused to give up the works, or the material thereof, or to allow the plaintiff to remove the same. The learned trial judge found that the property was worth \$1,500; that it belonged solely to the plaintiff; and that the defendant was guilty of a conversion in refusing to allow the plaintiff to remove the same as demanded. He therefore directed judgment for this amount, with interest from the twelfth of July, 1883. It has been affirmed by the general term.

Upon this appeal the appellant raises two questions: *First*, whether there can be a second conversion of property; *second*, whether the findings of fact above referred to support the conclusion of law made by the trial judge. Neither question admits of doubt. The defendant's wrongful act in January, 1883, did not change the title to the trestle-work, and although its then owners, the Valley Coal Company, might have sued for its conversion, they did not, nor were they bound to do so. Instead of that, two of its three owners chose to sell their interest in the property to the third, and he, after demand, brought this action. The pre-

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vious wrong on the defendant's part was no excuse for its failure to surrender the property when demanded, and the action was well brought by its then owner. As against the defendant, at any rate, the property has ceased to be a partnership asset. For anything within the record, the appeal is without excuse, and the judgment should be affirmed.

All concur.

AMELIA A. BARTHOLOMEW, Respondent, v. THE NEW YORK
CENTRAL AND HUDSON RIVER RAILROAD COMPANY,
Appellant.

Court of Appeals, June 1, 1886.

Negligence. Stopping at station.—A passenger upon a train is bound to act upon appearances; and, if the train, after the brakeman announces a station, is run so slowly as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of the passengers requires the train to be so run and managed as not to endanger their lives; and a sudden jerk or start, without warning, when the passengers are upon their feet moving toward the platform of the cars, is sufficient evidence of carelessness to impose liability upon the company; and a charge in such case that, if the train appeared to have stopped, then for all practical purposes and for the consideration of this case, it had stopped, is not erroneous.

This is an action brought to recover damages for personal injuries.

Appeal from a judgment of the general term of the supreme court, affirming a special term order denying a motion for a new trial.

Edward Harris, for appellant.

Wm. S. Oliver, for respondent.

EARL, J.—The only ground of error alleged by the defendant is the exception taken to the following phrase in the judge's charge: "If the train appeared to have stopped,

then, for all practical purposes and for the consideration of this case, it had stopped."

This phrase was followed and explained by this language: "If from the evidence you shall say that when this woman stepped out upon the platform, the train had stopped or appeared to persons of ordinary intelligence and observation to have stopped, following, as it did, the conceded announcement, the fact that an announcement had been made that the station had been approached, and by a sudden jerk, of which she had no warning, she was precipitated and received this injury, she has a right of action."

There was no error in the portion of the charge excepted to. The plaintiff was in a strange place in the night-time, and upon her inquiry, as the train neared Rochester, the conductor informed her that she must change cars at the first place at which the train would stop; that "Rochester" would be called, and she must take the second right-hand train.

Some time after this the brakeman called "Rochester, change cars." The train was then either stopped, or slowed down, so that to her, in the inside of the car, it appeared to have stopped. She was bound to act upon appearances, and after making the announcement, if the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of the passengers required the train to be so run and managed as not to endanger their lives; and a sudden jerk or start, without any warning, when the passengers were upon their feet moving toward the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. As to anyone in the cars, when the train appeared to have stopped it was the same as if it had stopped, and the same duty rested upon the defendant to care for the safety of the passengers.

The judgment should be affirmed, with costs.

All concur.

CAROLINE HARBECK, Appellant, v. JOHN H. HARBECK,
Respondent.

Court of Appeals, June 1, 1886.

Affirming 31 Hun, 640, Mem.

Husband and wife. Proof of marriage.—Where a union between the parties is at first illegal, followed by no formal celebration of marriage, without evidence of any present agreement to take each other for husband and wife, or at least with doubtful proof of any change of relations, the finding of the trial judge thereon that no contract of marriage was ever entered into between them, has evidence in its support which raises a conflict, and precludes the court of appeals from reviewing the weight of the testimony.

This is an action for divorce; and the only question litigated was as to whether the parties were married, as no ceremonial marriage had taken place between them.

Appeal from a judgment of the general term of the supreme court, affirming judgment in favor of defendant.

Wm. H. Howe, for appellant.

Wm. Fullerton, for respondent.

DANFORTH, J.—The trial judge and the general term have found against the plaintiff, and notwithstanding a difference of opinion among the judges of the court below, we are constrained, after a careful consideration of the evidence to sustain the judgment which followed the conclusion of the majority. That the union between the parties was at first illegal is conceded. If a change occurred, it was followed by no formal celebration, nor is there evidence of any present agreement to take each other for husband and wife; and that they ever passed, by contract or by mutual con-

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sent, from the state of concubinage into that of marriage, is made doubtful by the admission of the plaintiff, proven by the testimony of her sister, by that of the defendant's father, and by other witnesses. If that testimony is true, it is difficult to find that she herself regarded the connection as matrimonial, or that its continuance depended upon anything more binding than the inclination or will of the defendant. It is true that he assumed the character of husband and she of wife, and reported themselves in that relation to their associates and others; and there was enough in their conduct, *prima facie*, to entitle each to the civil rights which belong to the real character; but the testimony to which I have referred, and circumstances disclosed by others, raised a conflict in evidence, which we cannot, as an appellate court, declare to be insufficient to show that the assumption was unfounded. Such was the conclusion of the trial judge. His finding is that no contract of marriage was ever entered into between the plaintiff and defendant, and we cannot say it has no evidence in its support. In the face of that finding, this appeal must fail. The judgment should therefore be affirmed.

All concur.

Opinion PER CURIAM.

**SAMUEL SEELEY, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.**

Court of Appeals, June 1, 1886.

Negligence. Nonsuit.—Where, in an action to recover damages for the negligent setting fire to and burning plaintiff's barn by coal escaping from the smoke-stack of a locomotive passing on defendant's road adjoining plaintiff's premises, defendant insisted that the fire was caused by either of two engines passing on its road, both of which were claimed to be in perfect order, but it was shown that it might have been caused by another engine having a hole cut in its fire screen and not in good order, it is a question of fact for the jury to determine which engine caused the fire, and a nonsuit is properly refused.

Appeal from a judgment of the general term of the supreme court, reversing a judgment of nonsuit in favor of defendant, and granting a new trial.

Wm. H. Adams, for appellant.

Stephen K. Williams, for respondent.

PER CURIAM.—The principal question involved in this case is whether the negligence of the defendant caused the barn of the plaintiff to be set on fire. There was a conflict in the evidence in regard to the fact whether the engine which caused the fire was sufficiently guarded by a screen on the top of the smoke-stack which prevented coals of fire from escaping. The defendant's counsel claims that the fire was caused by one of two engines passing at about the time of the fire, and which engines were both fully protected in respect to fire screens. An examination of the testimony discloses that it is not entirely clear whether the fire was

caused by either of the two engines mentioned, or by another which was not properly guarded so as to prevent the escape of coals of fire.

Harriet Burley, a daughter of the plaintiff, testified :

" Some five or six of defendant's locomotives passed there that morning before the fire, going in both directions. * * * There were trains passing there frequently that morning. Trains do frequently pass there without my noticing them. * * * The trains I have mentioned are the only ones I *noticed* within half an hour previous to the fire."

Mrs. Seeley, plaintiff's wife, testified :

" Had seen a number of trains of defendant's cars passing there shortly before I discovered the fire. Fifteen or twenty trains passed⁶ there that morning, more or less. * * * I didn't *notice* any train until after I saw the smoke. * * * I was at work in the kitchen just before I discovered the fire. I hadn't been giving attention to the trains. The last train I *noticed* before the fire was the work train. These three were the only locomotives I noticed."

Thomas Cram, a conductor for the defendant, testified that an empty engine went west about the time of the fire, about fifteen or twenty minutes before they were called to the fire; that there were some fires after that engine passed; that he saw several fires immediately after it had passed.

There was no proof given as to the condition of this engine as to the fire screen, but there was some evidence that the fire screens on the other two engines spoken of were in good order. It is, however, nowhere shown that the fire was caused by either of the two last mentioned engines. On the contrary, it is shown that it may have been caused by some other engine, the fire screen of which was not in perfect or even in good order, as many of them had holes cut in to make better draft.

It will thus be seen that it is by no means conclusive that the fire was caused by either of the two engines, which, it was claimed, were in perfect order; and, as the case stood,

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it would be a question of fact for the jury to determine which engine caused the fire.

There is no other question in the case that requires attention.

The judgment should be affirmed.

All concur.

ANNA M. HOUSE *et al.*, Respondents, v. JOSEPH A. EISENLORD, Administrator, etc., Appellant.

Court of Appeals, June 1, 1886.

Affirming 30 Hun, 90.

Mortgage. Extension. Costs.—The payment of nearly all the interest due on a mortgage with an offer to get the small balance due and permission to the mortgagor to take his time, does not operate as an extension of time, nor as a waiver or estoppel which precludes the mortgagee from bringing an action to foreclose the mortgage on default, under the thirty day clause, occasioned by the non-payment of such balance; but the court can exercise its discretion as to dismissing the complaint and awarding costs.

Action to foreclose a mortgage containing the interest clause, for default in paying a balance of interest.

Appeal from a judgment of the general term of the supreme court, affirming a judgment of the special term for foreclosure and sale of the mortgaged premises.

J. E. Dewey, for appellant.

N. C. Moak, for respondent.

EARL, J.—There was no valid extension of time for the payment of the small balance of interest, and there was no waiver or estoppel which precluded the plaintiff from bringing this action. While, under the circumstances of this

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case, a court of equity, in the exercise of its discretion, might have dismissed plaintiff's complaint, it was not bound to do so, and hence there was no error of law in refusing to do so. Whether the defendant should have costs was in the discretion of the court below, and that discretion is not subject to review here. The rights of the defendant were sufficiently protected by the denial of costs to the plaintiff, and by the form of the foreclosure judgment entered.

The judgment should be affirmed, with costs.

All concur.

**IN THE MATTER OF THE APPLICATION OF THE NEW
YORK, LACKWANNA AND WESTERN RAILWAY COM-
PANY.**

Court of Appeals, June 1, 1886.

- 1. Railroads. Commissioners of appraisal under contract.**—A contract was made between the petitioner and owner of land for the sale thereof, whereby it was stipulated that the commissioners appointed under the general railroad law shall, in ascertaining and determining the compensation to be allowed, take into consideration the capability of the premises and property for any use whatever, and that they shall determine such compensation upon their own knowledge and information, as well as upon such evidence as may be produced before them. On a former appeal in this matter to the general term, the court laid down the rule that the owners were entitled to be allowed the fair market value of the property, and that this was the basis on which the estimate should be made by witnesses and the commissioners. Two of the commissioners, during the hearings, announced that they did not consider themselves bound by the supreme court decision on this point, and the petitioner made an application for their removal on the ground of misconduct in declining to be governed by the general term opinion. The court of appeals decided that, under the peculiar circumstances of this case, it could not be held to be misconduct in them to refuse to commit themselves, in advance, to a rule of decision which would exclude from their

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consideration matters to which it was expressly agreed they might have reference in reaching a result; especially as there is nothing in the case to show that in declining to do so, they intended to be disrespectful to the court, or arbitrarily to overrule its opinion, or to be contumacious or perverse.

2. *Same. Review of awards.*—Though, under the statute, a railway company can not by appeal obtain a review, on the merits, of a second award, yet it is within the power of a court of equity to set aside any excessive award obtained by fraud or the misconduct of the commissioners, or for any cause which will justify the setting aside of an award of arbitrators; and such relief can be obtained on motion.
3. *Same. Appeal.*—An order of the general term affirming a special term order, vacating an order appointing commissioners in condemnation proceedings, is appealable to the court of appeals, as it is final and affects a substantial right.

Appeal from an order of the general term of the supreme court, modifying and affirming a special term order vacating the appointment of certain commissioners for the appraisal of land.

Geo. F. Comstock and *Morris Morey*, for appellants, Harriet A. Bennett and others.

Sherman S. Rogers, for respondent, New York, L. and W. R. R. Co.

RAPALLO, J.—This proceeding was instituted in pursuance of a written contract between the petitioner, the railway company, and the appellants, bearing date the twenty-fourth day of May, 1888. By that contract the railway company agreed to purchase of the appellant, Harriet A. Bennett, the property known as the "Union Elevator," at Buffalo, and with due diligence to take proceedings under the general railroad law for the purpose of ascertaining the value of the premises and of the erections thereon, and the compensation to be paid therefor, and of obtaining the title in fee thereto. It was stipulated in the contract that Nelson K. Hopkins, Robert Dunbar, and Brigham Clark should be appointed commissioners in said proceedings, to ascertain the compensation which ought justly to be made by the company to the

party or parties owning or interested in said property, and that the decision of the majority of them should be binding on both parties. It was further mutually agreed that the said commissioners should be governed, in estimating said valuation and compensation, by the rules of law applicable to proceedings under said statutes, "*excepting as they might be modified by this agreement,*" and that all rights of appeal given by law should be reserved to either party. It was expressly agreed that in said proceedings no damage should be allowed because of injury to the Bennett elevator property, or any adjoining or adjacent premises, or any compensation allowed for anything except the actual value of the premises and property described in the agreement; that, in ascertaining the compensation to be allowed, the commissioners should "take into consideration the capability of the premises and property for any use whatever;" and that they should determine such compensation without delay, and upon their own knowledge and information, as well as upon such evidence as might be produced before them. The contract then went on to provide that the value finally arrived at in said proceedings should "be the fixed purchase price" to be paid by the railway company. It prescribed the time of payment and of delivery of possession, and also provided for the execution and delivery, by the appellant Harriet A. Bennett, to the company, of a deed, with covenants of seizin and for quiet enjoyment, conveying a perfect title to the premises, except as to certain incumbrances for which allowance was to be made out of the purchase money. The contract contained further stipulations respecting mutual accommodations in the use of their docks by the Union elevator and Bennett elevator properties, and various other stipulations not affecting the main question presented upon this appeal, but to which it may be necessary incidentally to refer.

The proceeding for the appraisement of the property agreed to be sold, was instituted by the railway company,

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as it had agreed, and in October, 1883, in that proceeding, thus instituted, an order was made by the supreme court at special term in the fourth department, appointing the three gentlemen named in the contract commissioners to appraise the property. They made a report in January, 1884, fixing the compensation to be paid at the sum of \$469, 375, which report was confirmed at special term; but, on appeal by the company to the general term, the order of confirmation was reversed, and the commissioners' report was set aside. On that appeal an effort was made by the railway company to have new commissioners appointed; but the supreme court refused that relief on the sole ground that it had not the power to grant it because the parties had, by their contract, agreed upon the commissioners. From that decision the railway company appealed to this court. No appeal was or could have been taken by the property owners from that part of the order which set aside the report of the commissioners, and consequently there has been no review here by that part of the decision of the general term. The ground on which that tribunal refused to appoint new commissioners was, however, reviewed here, and the decision was fully sustained. 98 N. Y. 447. The case then went back for a rehearing before the same commissioners, and, while that rehearing was pending before them, the railway company made a motion to the court at special term to vacate the order appointing the commissioners on the ground of alleged misconduct on their part. The allegations of misconduct contained in the moving papers were of two classes. One was that Mr. Robert Dunbar, one of the commissioners, had business relations with the claimants Bennett and wife which prevented him from being a disinterested appraiser. These charges were answered at the hearing at special term to the satisfaction of the presiding judge; and the counsel for the company does not now complain of the disposition made of that branch of the charges; but he confines himself on this appeal to the re-

maining branch, which is, in substance, that commissioners Dunbar and Clark, on the second hearing, declined to be governed by the opinion of BRADLEY, J., who delivered the opinion of the general term on the appeal from the order confirming the report of the commissioners. This refusal was regarded by the court below as misconduct which justified it in vacating the appointment of commissioners, and thus necessarily terminating the proceeding.

The precise manner in which the alleged misconduct is claimed to have been committed is set forth in the brief of the counsel for the railway company, and in the moving affidavits, which, for the purpose of this appeal, we must assume to be correct. Evidence had been admitted, on the first hearing before the commissioners, of the manner in which the property in question could be utilized by expending a large sum in increasing the capacity of the elevator, and estimating the income which it would be capable, with these improvements, of producing and these estimates were mainly based upon evidence of the income earned by other elevators in Buffalo; and opinions as to the value of the property in question had been given, based, not upon the market prices of the property as it was at the date of the contract, but upon what it might be made to pay by improving it as an elevator; also of its capacity to handle grain, if improved and operated in connection with the Bennett elevator, which was alongside. Evidence had been admitted, on that hearing, of estimates based upon projected connections with railroad companies, and facilities for transportation not under the control of the owners of the property in question, and other speculative matters.

In the opinion delivered by BRADLEY, J., and before referred to, the learned judge said that, when compared with other sales of property in the same locality, the value, as appraised by the commissioners, was exceptionally large; and he commented upon the evidence which had been given before the commissioners, and pointed out the contingencies

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to which some of the considerations on which the witnesses based their estimates were subject, and expressed the opinion that these estimates were matters of speculation, dependent on too many circumstances to be entitled to consideration as evidence of value. In these observations he referred, among other things, to the evidence as to the contemplated relation of the property to, and its operation in connection with, other property, and projects for connecting facilities with channels of transportation not within the control of the then owner of the property in question; and he said that, in view of all the testimony, it was difficult to escape the conclusion that the commission reached the result which they did by the application of erroneous principles to the appraisal of the value of the property in question, and that the amount of compensation awarded by their report was by that means increased considerably in excess of the fair market value of the property. In this opinion the learned judge laid down the rule that the owners were entitled to be allowed the fair market value of the property, and that was the basis on which the estimate should be made, and allowed, by witnesses and the commission.

On the second hearing before the commissioners, evidence of David S. Bennett was received of a valuation based upon the probable earnings of a new elevator of a certain capacity, if erected upon the lot in question, based upon the past earnings of two elevators, which were named, and upon projected connections with lines of transportation. After the examination of this witness had been concluded, the counsel for the railway company moved to strike out his testimony so far as it assumed to give a value in dollars to the property in question. The grounds of the motion were specified; one of them being that the testimony on which the estimate was founded was inoperative and worthless under the decision of the general term. The motion to strike out the evidence was finally denied; Commissioner

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Hopkins being in favor of striking it out, Commissioners Clark and Dunbar of retaining it, Commissioner Dunbar saying that he was inclined to receive the evidence, and give it the weight which he thought proper. The question was raised at other stages in the case, and the substance of the struggle was, on the part of the railway company, to maintain that the decision of the general term was that the evidence and the valuation should be confined to the market value of the property as it was at the date of the contract, and that this decision was binding upon the commissioners, and should be followed by them; while, on the other hand, it was claimed that they were not so restricted, but were entitled to consider the rights of the parties under the contract, and make a just award between them; and reference was had to the opinion of this court on the first appeal.

The commissioners were then requested, by the counsel for the railway company, to rule on three propositions, viz.: *First*, there cannot be taken into consideration, in arriving at the value of the property, the probabilities of a connection with the railroad of the petitioner as one element affecting that value; *second*, that the opinion of the general term in the proceeding is controlling upon the commissioners as to the principles which should govern them in making their award; *third*, that the measure of the award is the fair market value of the property as it was at the date of the contract. The commissioners then adjourned without ruling on the propositions, and at their next meeting, having consulted among themselves, Commissioner Dunbar announced that he did not consider himself bound by the supreme court decision, but did consider himself bound and sworn to ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the property, and that he considered himself bound to do justice between the parties, and as much justice to the railroad commissioners

as to Mr. Bennett, as far as he knew. Commissioner Clark concurred with Commissioner Dunbar.

That the decision of Commissioner Dunbar, to the effect that he did not consider himself bound by the supreme court decision, had reference to that part of the opinion of Judge BRADLEY which held that the basis upon which the appraisal should be made was the market value of the property, is made very clear by the colloquy set forth in the moving affidavits, and by the request of the counsel for the railroad company to the commissioners to rule upon the point. Mr. Dunbar introduced the remark, by saying, "Mr. Hopkins spoke to me this morning in respect to following the general term decision;" and Mr. Hopkins stated that the particular point to which he had called the attention of Mr. Dunbar was as to the manner of arriving at the value of the real estate.

It is needless to go over the various forms in which the question was raised by the counsel for the company, as it clearly appears that the substance of the whole controversy was whether the commissioners were bound to follow the rule laid down in the quoted portion of the opinion of BRADLEY, J., at general term, on the case as there presented to him, and to exclude from their consideration, in making their appraisal, all evidence except such as bore upon the market value of the property as it was at the date of the contract; thus excluding estimates based upon the development of the property by means of improvements of which it was capable, and the probable increase which might be derived therefrom by means of such improvements; and the question for our determination is whether the commissioners, in declining to hold, in advance of any appraisal, that they were concluded on the point referred to, were guilty of misconduct which authorized the court below to vacate the order appointing them, and thus terminate the proceeding.

In respect to these matters the position of the commis-

sioners was peculiar. They were not acting merely as officers of the court, owing their appointment solely to it, but they had been selected by the solemn contract of the parties; and that contract established the principles by which they should be governed in making the appraisement. After the decision of the general term on the first appeal had been pronounced, the case had come before this court, and it had adjudged that the provisions of the contract so far as they bound the parties, were binding upon the court in carrying the contract into effect. Even if it should be conceded that the court had it originally in its power to decline to lend its aid to the carrying out of the contract, by refusing to appoint commissioners, and thus disabling the company from taking the first step which was essential to give vitality to the contract, it does not follow that after the court had entertained the proceeding, and set the machinery in motion by which rights had accrued to the parties, it could of its own volition, or in its mere discretion, terminate those proceedings, or require them to be conducted in a different manner or on different principles from those which had been agreed upon. On the former appeal to this court it was held that, notwithstanding the right of appeal was reserved to both parties, and notwithstanding that the statute authorized the court in ordinary cases, on the first appeal, not only to set aside the award of the commissioners, but to appoint new commissioners, yet that in this case it could not exercise the power to change the commissioners, because that would be a violation of one of the terms of the contract.

The same principle applies in respect to the rules which should govern the commissioners in making their appraisement. The contract provided in that respect, that they should be governed by the rules of law applicable to proceedings under the statute, *except as they might be modified by the contract*. One of these modifications was that no damages should be allowed because of injury to the ad-

jacent premises. Could it be seriously argued that the court could, at the instance of the property owners, have required the commissioners to allow such damages because the statute authorize their allowance, or that it would be misconduct on their part, which would authorize their removal, to refuse to make such allowance if the court had, at some previous stage of the case, decided that it was proper? Assuming that the learned counsel for the company is right in claiming that the general rule in condemnation proceedings is, as he asked the commissioners to hold, "that the measure of the award is the fair market value of the property *as it was at the date of the contract*," and that this was a correct rendering of the opinion of the general term, we come back to the question whether the commissioners were bound so to decide in this case, in the face of the express stipulation of the contract "that, in ascertaining and determining the compensation to be allowed the said commissioners shall take into consideration the capability of the premises and property for any use whatsoever, and that they shall determine such compensation upon their own knowledge and information, as well as upon such evidence as may be produced before them." This language is much more comprehensive than "the market price" or "market value" of the premises at the date of the contract, and shows that the real value was to be ascertained, predicated, not merely upon the condition of the property as it was at the date of the contract, or the uses to which it was devoted at that time, but upon its capabilities for any use whatever; and would fairly admit, as an element of value, evidence of the improvements of which it was capable, and of the revenues which might with reasonable certainty be expected to be derived from the development of those capabilities. The peculiar nature of the property might be such that it had no fixed market value, and the parties therefore agreed that the commissioners, who were persons of experience, acquainted with the means of rendering property of that description available, might

take into consideration what it was capable of yielding with reasonable and judicious development and management.

Of course as just and reasonable men, it would not be expected that they would calculate as certainties profits which were speculative, and contingent or variable, but the language of the contract certainly implies that they were not to be confined, in their estimate, to the sum which it could be proved the property would bring if exposed for sale in the open market, or to a valuation based upon sales of other property in the vicinity. They were selected and agreed upon by the parties as competent judges of the real value of property of the description which was the subject of inquiry, and it is not to be assumed that they would omit to make due allowance for contingencies and uncertainties and to properly weigh the evidence in connection with their own knowledge and information, to which, by the terms of the contract, they were expressly authorized to resort; and we are of opinion that, under the peculiar circumstances of this case, it could not be held to be misconduct in them to refuse to commit themselves, in advance, to a rule of decision which could exclude from their consideration matters to which it was expressly agreed they might have reference in reaching a result.

There is nothing in the case to show that, in declining to decide as required by the counsel for the company, they intended to be disrespectful to the court, or arbitrarily to overrule the opinion referred to, or to be contumacious or perverse; but, on the contrary, it would rather seem that they intended conscientiously to perform their duty conformably to the contract under which they were appointed. The contract was one which secured advantages to both parties in return for rights which they surrendered. The railroad company evidently desired to acquire the property; and, if it had been compelled to resort to proceedings *in invitum*, it would have been open to the owners to resist them, and to contest the questions whether the property was re-

quired for railroad purposes, and whether the railroad company could in any event acquire more than a right of user. These points the owners surrendered by covenanting to give a deed in fee, conveying a perfect title, with covenants of seizin and quiet enjoyment, which no law could have compelled them to do. They also abandoned their claim to damages to adjacent property, which the law would have allowed, and they also agreed to withdraw the suits which they were then prosecuting against the company in relation to Darkbasin alley, and to assign to the company all their rights in that alley; also to convey to the company all their rights in and adjoining the Evans ship-canal, which the company were at the time seeking to obtain by proceedings under the railroad law. Various other arrangements for the mutual convenience of both parties were provided for in the contract, and the whole was based upon the assurance of a just compensation being made for the Music elevator property, by having it appraised by three gentlemen of experience, agreed upon by the parties, who were to value the property in the manner provided by the contract. To require those arbiters to adopt any different rule of valuation, after the contract had been partly performed, and when the company was in the enjoyment of some of the benefits which were to be granted to them on its performance, would be a subversion of the rights of the appellants under the contract, which is inadmissible.

It must further be observed that the application to vacate the appointment of the commissioners' was made and granted before any appraisal or award had been made by them, and before it could be known what effect they would give to the evidence on the question of value, which they admitted, and declined to strike out. Commissioner Clark stated, in answer to the motion to strike out, that he thought the evidence was in the same line as that which was admitted on the former trial, and that he thought it ought to be received, and Commissioner Dunbar stated that he was in-

clined to receive it, and give it the weight he thought proper. There was nothing in this which was final, or which showed that the commissioners might not, in arriving at a decision, be guided in their judgment by the reasoning of the general term as to the weight to be given certain portions of the evidence, and might not finally reach a just award. Some of the evidence on which Mr. Bennett had based his valuation related to facts explanatory of the capabilities of the property, which, in our judgment was proper to be considered, and some to estimates and projects uncertain and conjectural in their character. It was certainly not impossible that, in weighing this evidence, the commissioners, enlightened by the opinion of the general term, might make the proper discriminations, and form a sound judgment in the end. There was no evidence impeaching their integrity in the matter, and the learned counsel for the respondent, in their argument in reply, expressly state that they do not charge actual dishonesty on the part of the two commissioners, but do charge an obstinate and perverse determination to follow in the forbidden paths, and on that ground claim the right to remove them before it can be ascertained, by their decision, to what result the paths alleged to be forbidden will lead them.

In answer to the objection that the removal was, to say the least, premature, they reply the finality of the second report, under the general railroad act; and on this ground demand that the appellants should be absolutely debarred of the means of enforcing their contract of sale in the manner provided by the contract, on the mere apprehension that the commissioners will, through mere obstinacy and perversity, make an excessive award against them, and that in that case they would be without remedy. Aside from other answers to this argument of the respondent, a sufficient one is that although, under the statute, the petitioners could not by appeal obtain a review, on the merits, of a second award yet it would be within the power of a court of equity to set

aside any excessive award obtained by fraud or the misconduct of the commissioners, or for any cause which would justify setting aside an award of arbitrators ; and in a proceeding like this the same relief could be obtained on motion. If this application had not been made, and the commissioners had proceeded to a second award, it could have been set aside if misconduct could be shown ; and the same remedy will again be open to the petitioners if the second award is impeachable for that cause. But it should not be assumed, in advance, that the commissioners will, in making their final award, be guilty of misconduct or bad faith, or willful disregard to the legal rights of either party. In this case the apprehension that they will do so is mainly founded upon the fact that their first award was unsatisfactory to the petitioners, and was set aside by the court as excessive. The court at general term had power, on that appeal, to review the award on the merits, and order a rehearing, and that order was not reviewable in this court. What award they will make on the rehearing cannot now be known, and the mere apprehension that it will be excessive is not sufficient to justify their being prevented from making any. *Livingston v. Sage*, 95 N. Y. 289.

We have no doubt of the appealability of the order. It was final, as it necessarily terminated the proceeding : and it affected a substantial right, as it deprived the appellants of the fruits of their contract by rendering its enforcement impossible.

The orders of the special terms should be reversed, and the application to vacate the order appointing commissioners denied with costs.

All concur, except RUGER, C. J. and EARL, J. dissenting.

Statement of the Case.

MARY P. MURDFELDT *et al.*, Appellants, v. THE NEW YORK, WEST SHORE AND BUFFALO RAILWAY COMPANY, Respondent.

Court of Appeals, June 1 1886.

Affirming 34 Hun, 632.

1. *Specific performance. Discretion of court.*—Though a passageway under a railroad was reserved by deed to be built and maintained by the company, yet, where the construction of a useful passage is difficult, and if constructed, will be useless to the plaintiffs, it is within the discretion of the trial court, in the exercise of its equitable jurisdiction, to deny specific performance of defendant's contract to construct the passage, and leave the plaintiffs to their remedy for damages for breach of the covenant.
2. *Trespass. Contractor.*—Where a railroad company lets the contract to construct its road through plaintiff's premises to contractors, and it does not appear that such contract could not have been executed without any interference with the land on which the alleged trespass was committed by such contractors, the company cannot be said to have caused the trespass and is not liable for it.
3. *Same. No proof of damages.*—Where the plaintiffs do not prove, nor offer by any competent evidence to prove, any amount of damages for an alleged trespass, there is no basis for the allowance of any substantial damages.
4. *Same. Joint interest.*—The life tenant and the owners of the reversion are not jointly interested in the damages arising from a breach of a covenant, by a railway company, to construct and maintain a passageway under its railroad. The reversioners not entitled to any damages for breach of such covenant, during the existence of the life estate.

Action to compel the specific performance of a covenant in a deed, by which the grantee agreed to construct and maintain a passageway under its railway, and to recover damages for alleged trespass.

Appeal from the judgment of the general term of the supreme court, affirming judgment for defendants.

Opinion of the Court, by EARL, J.

E. A. Brewster, for appellants.

A. S. Casedy, for, respondent.

EARL, J.—In view of the difficulty in constructing a useful passage under the railroad, and the inutility to plaintiffs of such passage, if constructed, it was certainly within the discretion of the court below, in the exercise of its equitable jurisdiction, to deny specific performance of defendant's contract to construct the passage, and leave the plaintiffs to their remedy for damages for breach of the covenant. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311. There was no allegation in the complaint that the plaintiffs had suffered any damage from the breach of the covenant to construct the passage. There was no proof upon the trial which authorized the court to award any damages for such breach, and there was no claim made by the plaintiffs that, if specific performance should be denied, the case should be reserved for further proof and hearing as to the damages. The whole case was submitted to the trial judge upon the proofs given, and he did not err, under the circumstances, in leaving the plaintiffs to their action at law to recover their damages for the breach of covenant. He found, however, as a matter of law, that they had not sustained any damages from the breach of the covenant. That finding was properly based upon the finding of fact that they had proved no amount of damages from the breach of the covenant, and cannot be given wider scope. Mary F. Murdfeldt, one of the plaintiffs, had a life-estate in the premises to be benefited by the covenant, and the other plaintiffs were owners of the reversion, and hence the plaintiffs were not jointly interested in these damages, and it is difficult to perceive how the reversioners are entitled, at this time, to any damages for breach of this covenant, and hence the learned trial judge may have meant by that finding of law that the plaintiffs were not jointly entitled to the damages. But that finding must be construed with the other, which turned the plaint-

Opinion of the Court, by EARL, J.

iffs over to their action at law for their damages, and could not, therefore, conclude them in such action should they bring one.

As to the damages for trespass upon the lands west of the railroad, the proof did not authorize a recovery by the plaintiffs. They, through their agent, had knowledge at the time of what was done by the contractors under the defendant, and made no objection. It let the contract to construct its road to the North River Construction Company. The latter company sublet the construction of the road through plaintiff's premises to Ward, MacKin & Co., and they sublet a portion of their work to one O'Rourke, by whom the alleged trespass was committed. It does not appear that the contract which the defendant made with the North River Construction Company could not have been executed as made without any interference with plaintiff's land on the west side of the railroad, and hence it cannot be said that the defendant caused the trespass or is liable for it. But there is a still further answer to the claim for damages on account of the trespass. The plaintiffs did not prove, and did not offer by any competent evidence to prove any amount of damages for the alleged trespass, and the trial judge so found, and hence there was no basis for the allowance of any substantial damages to the plaintiffs. The judgment should therefore, be affirmed, with costs.

All concur.

MARY O'CONNER, Respondent, v. LAWRENCE CONZEN,
Appellant.

Court of Appeals, June 1, 1886.

Civil damage act. When case sufficient to go to jury.—Where the defendant testifies that he kept a liquor store during the time in question, knew plaintiff's husband to be a regular drunkard, and had seen him in his place many times and never sober, and where plaintiff testifies that that she saw her husband drinking liquor repeatedly, that she repeatedly spoke to defendant, requesting him not to sell her husband liquor, but that he disregarded her requests, and that after these occasions her husband struck and otherwise abused her, and failed to render her support or contribute to it, the evidence is sufficient to require the case to be submitted to the jury, and to render their determination of the question conclusive upon the court of appeals.

See note at end of case.

N. C. Moak, for appellant.

Charles J. Patterson, for respondent.

DANFORTH, J.—It is now contended by the appellant that there is no evidence that O'Conner drank intoxicating liquor on defendant's premises, or, if he did, that it intoxicated him, or was the cause of legal damage to the plaintiff, and hence that the defendant is not liable under the provisions of "the act to suppress intemperance, pauperism, and crime" (Laws 1873, chap. 646), on which this action is founded. The same propositions were submitted to the trial court. At the close of the plaintiff's case, and again at the close of the entire testimony, a motion was made to dismiss the complaint. It was denied; and an exception then taken is the only one presented by the record. That the defendant kept a liquor store during the time in question; that he knew O'Conner to be a regular drunkard; that he had seen him

Note on the Civil Damage Act.

in his place many times, and never sober—was his own testimony. The plaintiff testified that in February or March, 1880, she saw her husband drinking liquor in the defendant's place, with persons whom she knew and named: that he was afterwards "beastly drunk," brought home by one of those persons and another; that she saw him in the defendant's saloon repeatedly, naming several instances, drinking ale "and pretty drunk;" and upon other occasions drinking liquor sometimes, and sometimes ale; that she repeatedly spoke to the defendant, requesting him not to sell her husband liquor; that he disregarded her requests; that after these occasions her husband struck and otherwise abused her, and failed to render her support or contribute to it. The defendant denies that he sold or gave to O'Conner any liquor or intoxicating drink. He denies, also, that he was notified by the plaintiff not to sell her husband liquor. He goes so far as to say that upon one occasion when O'Conner tendered money with which to pay for liquor he refused it.

If the jury believed the defendant's testimony, a verdict against him would have been impossible. They were not bound to believe him; their verdict shows they did not. The evidence was sufficient to require a submission of the question as one which might be answered in favor of the plaintiff.

Other propositions have been argued by the learned counsel for the appellant, but they are founded upon no exception, and therefore permit no consideration upon this appeal.

We think it plain that the judgment should be affirmed.

All concur.

NOTE ON THE CIVIL DAMAGE ACT.

This statute has been in operation in this state for about 17 years and has been many times before the courts for construction. Though many of its provisions have become quite well settled by adjudication, still new features are constantly arising, and presenting difficult problems for solution.

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The principles already decided are fully set forth in the discussion of the cases commented upon in this note.

The act is found in chap. 646, Laws of 1873, and entitled "An act to suppress intemperance, pauperism and crime."

Section I. reads, as follows:

Civil Damage Act.—Section 1 of chap. 646, Laws of 1873, is as follows: "Every husband, wife, child, parent, guardian, employer or other person who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name, against any person or persons who shall, by selling or giving away intoxicating liquors, cause the intoxication, in whole or in part, of such person or persons; and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages, sustained and for exemplary damages; and all damages recovered by a minor, under this act, shall be paid either to such minor or to his or her parent, guardian or next friend as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises."

Constitutional.—To enact the civil damage act was within the clear discretion of the legislature, as part of its police and sovereign power, and is not in conflict with any of the prohibitory clauses of the United States or the state constitution. *Franklin v. Schermerhorn*, 8 Hun, 112. The act must be deemed part of the excise law of the state, which has been repeatedly held constitutional. *Id.*

History.—In 1855 a prohibitory law was passed. This was repealed in 1857, and in that year an act was passed to regulate the sale of liquors. This was amended in 1870, still authorizing and regulating the sale; so that, in 1873, when the civil damage act was passed, it was legal to sell liquor by license, or in larger quantities without license. This act does not prohibit the sale, but provides that the seller must look out for the consequences of his acts. *Jackson v. Brookins*, 5 Hun, 530. The seller is bound by law to exercise judgment and discretion in making his sale, and if he fails in this respect, he becomes liable for the result. He can legally sell, but, if what he sells produces intoxication in whole or in part, and consequent damage, he must pay; if he sells to any one who is intoxicated, or who will use it to become so, he must take the risk of damage; he can do the legal act, but must do it in a proper manner.

What Sales.—In *Ford v. Ames*, 36 Hun, 571, an action was brought under the civil damage act. The defendant demurred to the plaintiff's

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complaint and thereby admitted that, by reason of the intoxication of plaintiff's husband, the plaintiff was injured in her property and means of support; and that said intoxication was caused in whole or in part by intoxicating liquors sold or given away by the defendant. It was held that the demurrer admitted all the facts necessary to constitute a cause of action under the statute. It admits that the defendant sold or gave away intoxicating liquors at a certain place, and that these liquors caused the intoxication of plaintiff's husband; and that by reason of such intoxication, viz.: through the death of her husband, caused thereby, the plaintiff, who had been wholly dependant on him for support was injured in property and means of support.

The defendant claimed that the complaint did not allege that the defendant sold or gave the liquors to plaintiff's husband. But the pleadings admit an allegation that the intoxication was caused by liquors sold or given away by defendant. This is exactly what the statute specifies as a ground of action. Whether or not the statute implies a selling or giving to the intoxicated person, and it would be necessary to prove such fact on the trial, need not be decided in disoussing the question arising upon the demurrer. It is certainly enough, in a pleading, to aver facts which come within the language of the statute. *Id.*

Probably no one will claim that the wholesale dealer would be liable for damages arising from intoxication caused by a sale of liquors by the retail dealer. But it is not clear that, if two persons go to a retail dealer's shop, and one of them treats the other, and that other becomes intoxicated, the retail dealer may not be liable. Yet it can be argued that he neither sold or gave to the intoxicated person. And it may, therefore, have been intentional that the statute was not limited to a sale or giving to the intoxicated person.

Where two persons have a common purpose in buying the liquor to be drank by them at a future time, the case comes within the provisions of the statute, though the sale was made by the vendors to one of them individually, and he alone paid for the same, and they had no actual knowledge that the liquor was to be drank in part by the injuring party with the consent of the purchaser. *Dudley v. Parker*, 55 Hun, 29.

A right of action is given by the statute to the class of persons mentioned therein, who have suffered a loss in consequence of the intoxication of any person, against the person who sold the liquor which caused the intoxication in whole or in part. The statute does not, in terms, limit the seller's liability to the injured party to cases where the injury to the person making the complaint arises from the intoxication of the person to whom the liquor was sold and delivered. *Dudley v. Parker, ante*. To give the statute such a construction, would be to defeat in

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part the legislative intent and purpose as declared in the title of the act, and prevent a recovery in many cases which come within the spirit, as well as the very letter, of the statute.

It is fair to presume that every person engaged in selling liquor in small quantities knows that in most instances the same is purchased to be drank as a beverage by some one; and, if he has reason to believe, when the sale is made, that some other person than the one to whom the sale was, in form, made and the liquor delivered, was interested in the purchase, and was to drink the same, in whole or in part, the seller exposes himself, in case such person becomes intoxicated by drinking the liquor, to all the pecuniary liability imposed by law. If a child, unknown to the dealer, should apply for the purchase of a small measure of liquor, and the same should be supplied and taken by the child to the home of its parents and drank by them, and one or both of them should become intoxicated by its use, the seller could not successfully defend an action brought against him, on the sole ground that he had no knowledge that the liquor was to be used by the parents of the child who purchased it. In such a case, there would be sufficient evidence in the circumstances connected with the purchase to suggest to the dealer that the child, in making the purchase, was, as a matter of fact, acting for and in behalf of another, and to put the seller on inquiry for the purpose of ascertaining to whom the sale was in fact made. *Id.* The statute does not require actual knowledge on the part of the seller as to who the real purchaser is, or the person who is to share in drinking the liquor, in order to charge him with liability under the provisions of the statute.

The sellers are not liable if the purchase was, in fact, made in pursuance of an understanding between the purchaser and the injuring party that the liquor should be purchased for their common use, in case they did not know, nor have any reason to suppose or believe, that the other party was to share in the use of the liquor. *Id.* Their liability depends upon their having reason to suppose or believe, under the circumstances of the case, that the parties had arranged between themselves for purchasing the liquor to be drank by both of them. If either of the vendors knew, or had reason to suppose or believe, that, as matter of fact, the injuring party was not interested in the purchase he would not be liable, but it would present a case where liquor was purchased by a person who afterwards gave the same to be drank by another. *Id.* The statute imposes serious penalties on all dealers of intoxicating liquors who shall sell the same as a beverage, where intoxication is caused by its use, which are wholly unknown to the common law; and but few general rules can be laid down which will be applicable to all cases arising under the statute, and each case must be determined by its facts and attending circumstances.

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By agent.—If a barkeeper, whose business it is to sell liquor, sells without the knowledge of his employer, still this is the employer's act, because it is within the scope of the agent's authority. *Campbell v. Schlesinger*, 48 Hun, 428. But he has no authority to give away his employer's liquor any more than to give away any other property of his employer. When he does give away his employer's property, be it liquor or anything else, he is acting beyond the scope of his authority, and his act is not the act of his employer. *Id.* But there may be cases in which, upon the grounds of negligence, an employer might be liable for injury caused by the gift of property intrusted to a clerk. Though the employer may suspect that the clerk is pilfering from him, his neglect to discharge the clerk does not justify the clerk's wrongdoing or make him less liable to his employer therefor. If an employee steals from his employer, the latter does not give the stolen property. And it is the same, if the employee unlawfully converts the employer's property. There may be cases where acquiescence in the taking of property might be evidence of a gift; for instance, where the taking is in the presence of the owner and he does not object. So there may be cases where a gift of liquor might be inferred from circumstances without any direct words of gift. But if one discovers that his employee has stolen from him, such discovery does not turn the theft into a gift; and if he afterwards continues the employee in the same position, he does not thereby give the employee whatever he may thereafter choose to take. *Id.* When the innocent owner of the premises is made liable in damages for acts of his tenant which are lawful and licensed by law, the proof of such acts should be distinct. It should be shown that the tenant sold or gave, not that he did not stop the pilfering of his employee.

In *Smith v. Reynolds*, 8 Hun, 128, it was held that the supplying of liquor to a party who was afterwards injured by reason thereof, though done by the bartender without the knowledge or authority of his employer, and against his instructions, makes the employer liable, under the civil damage act, for the injury sustained. As a general rule, a master is liable to answer in a civil suit for the tortious or wrongful acts of his servant, if those acts are done in the course of his employment in the master's service; and it makes no difference that the master did not authorize, or even know of, the servant's act or neglect, for even if he disapproved of or forbade it, he is equally liable, if the act is done in the course of the servant's employment.

With license.—In *Goodwin v. Young*, 34 Hun, 252, it was held that the sale of liquor is not a wrongful act, either at common law or by the statute. It may be an act which the seller is specially licensed to do by the authorities of the state. But, under the civil damage act, it is of no consequence whether or not the vendor is licensed.

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A license to a seller from the board of excise of the town giving him permission to sell intoxicating liquors, does not bar an action against him under the civil damage act. *Quain v. Russell*, 12 Hun, 375; *Baker v. Pope*, 2 Id. 550. The only effect of the license is to mitigate damages, and is admissible as evidence for that purpose.

The civil damage act gives a right of action against one holding a license at the time of its passage. *Dubois v. Miller*, 5 Hun, 332. The legislature can make a man, who has done no unlawful act, liable in damages for acts done by another who is in no way his agent. And it is of no consequence whether the lawfulness of his act arose from his possession of a license or otherwise. No license is necessary to authorize a man to give away liquor. But, under the act, the giver is liable. No license is necessary for letting a building, and no law prohibits letting a building with knowledge that liquor is to be sold therein; but one who does this is liable. The statute, therefore, by its terms, makes persons who are doing lawful acts liable for the acts or omissions; and the licensee is in no better position than any one else. *Ib.*

The act of 1873, known as the civil damage act, in express terms authorizes the jury to give such exemplary damages as may be proper. The fact of a request from a wife to the seller not to sell liquor to her husband; a notice to the seller that the husband was in the habit of abusing his wife; the fact that the seller had previously sold liquor to the husband, or the fact that the liquor was sold without a license, is relevant upon the question of exemplary damages. *Grady v. Prigge*, 21 W. Dig. 61.

The civil damage act must be construed as part of the general excise law, under which licenses are granted. *Baker v. Pope*, *ante*. They are to be read as one act. When so read, it is plain that the legislature intended to impose upon every person who took out a license to sell liquor, as well as upon such as should sell without a license, the condition that they should be liable in damages for the injuries done by the purchasers of such liquors, if intoxicated thereby. *Id.* The seller is bound by the law to exercise judgment and discretion in making his sales, and if he fails in this respect he becomes liable for consequences. The act was intended to apply to all persons selling liquor, whether with or without a license. *Id.* By the last part of the first section, a special penalty is imposed upon persons who shall unlawfully sell or give away liquors, whereby they forfeit their rights as tenants under any lease of the premises. This provision is undoubtedly inserted for the protection of landlords against a continued liability for an unlawful use of their premises. But, in connection with the other parts of the section, it shows conclusively an intent to make

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liquor sellers, with or without a license, liable for the damages specified in the act. *Id.*

The statute does not forbid the sale, but attaches a liability, by reason of certain consequences of the sale. It imposes upon the seller the duty of guarding his conduct, so as to produce no mischievous results. He must not use his license to aid the poor in squandering the means necessary for the aid and support of families or the education of children. If his abuse of his license leads to such results, the law makes him liable for such damages as ensue. *Id.*

As the right of the legislature to restrain the sale of liquors is unquestionable, the person taking a license is subjected to all existing laws, and to such as may thereafter be passed. The right given is personal, and may be wholly taken away, or it may be restricted or burdened with conditions or penalties, to any extent the law-making power may deem proper. It is not a contract depriving the legislature of the right to act. *Id.*

Whether the license may be given in evidence, by way of mitigation of damages, was not decided in this case; but the court intimated that, if it could be, the weight of authority would allow such evidence under a general denial in the answer.

While the legislature has provided in the general excise law for granting license for the sale of intoxicating drinks, it has superadded in legal effect in the civil damage act, that such license shall be given, taken and received subject to the qualifications contained in this statute; and that every person taking such license shall be personally responsible for the consequences involved in the sale of such liquors. *Franklin v. Schermerhorn, ante.*

Action against owner of premises.—In *Mead v. Stratton*, 8 Hun, 148, it was held that a recovery can only be had against the owner of a building where intoxicating liquors are sold, under the civil damage act, upon clear and satisfactory proof establishing the permission to the seller or tenant to occupy, with knowledge that intoxicating liquors are to be sold therein; and neither the permission or the knowledge can be presumed or inferred.

The civil damage act, chap. 646, Laws of 1873, creates a cause of action unknown to the common law and a new ground of action. *Reid v. Terwilliger*, 42 Hun, 310; *Volans v. Owen*, 74 N. Y. 526; *Mead v. Stratton*, 87 Id. 493. In the last case, the court said that it was evident that the legislature intended to go in such a case far beyond anything known to the common law, and to provide a remedy for injuries occasioned by one who is instrumental in producing, or who caused, such intoxication. And to make the remedy efficient and ample, it gave it jointly against both landlord and tenant, and embraced actual and exemplary damages. To expose to these damages the landlord

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as well as the tenant, was manifestly the legislative instrument for the suppression of the evils of intemperance, pauperism and crime. *Reid v. Tewilliger, ante.*

In *Bertholf v. O'Reilly*, 8 Hun, 16, an action was brought against the owner of premises leased for the purpose of selling intoxicating liquors, and against the tenant who hired the premises for that purpose. The sale was made to plaintiff's son, who, by reason of the intoxication produced thereby caused the death of plaintiff's horse. The landlord knew that the tenant was selling intoxicating liquors after he took possession. The tenant had no license. The injury happened on a Sunday. And it was held that the act in question gives a right of action against the owner of the premises where the sale is made, severally or jointly, with the person selling, where the owner has knowledge that intoxicating liquors are to be sold thereon.

The object of the law was to prevent the impoverishment of families by reason of intoxication; to prevent the violence and injury resulting therefrom by making those who caused the intoxication liable for the damages which resulted to others by reason thereof. The tenant may sell, but he must be careful to whom he sells, and never to sell enough to cause intoxication, or add to an intoxication which has been commenced by sales of strong drink by others. The landlord must see that he rents his premises, if he rents them for the purpose of selling intoxicating drinks, to persons who will so sell that no person shall be injured in person, property or means of support by reason of his sales. The legislature required the owner, who alone has the power to lease and select his tenant, to assume the risk of his tenant's acts in the business of selling spirituous liquors when such tenant caused injury thereby.

In *Conklin v. Tice*, 48 Hun, 618, an action was brought by the plaintiff, as widow of one James A. Conklin, who is alleged to have been killed by being thrown from a wagon, the team of which he was driving. The defendant was the owner of a hotel kept by his lessee. The plaintiff's husband became intoxicated from strong drink furnished him by the lessee at this house. The defendant leased the hotel with full knowledge that intoxicating liquor was to be sold there. Plaintiff has a child under four years of age, and is left wholly dependent upon her own labor. And it was held that the lessor of the building used for a place in which to sell intoxicating liquors is liable for damages, under the civil damage act, as well as the lessee, if he leased the place for this purpose or knew that it was to be so used.

The legislature has the power to create a cause of action for damages, in favor of a person injured in person or property by an act of an intoxicated person, against the owner of real property, whose only connection with the injury is that he leased the premises where the

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liquor causing the intoxication was sold or given away, with knowledge that intoxicating liquors were to be sold thereon. *Bertholf v. O'Reilly*, 74 N. Y. 509. The leasing of premises to be used as a place for the sale of liquors is a lawful act, not prohibited by this or any other statute. The liability of the landlord is not made to depend upon the nature of the act of the tenant, but exists irrespective of the fact whether the sale or giving away of the liquor was lawful or unlawful, that is, whether it was authorized by the license law of the state, or was made in violation of that law. Nor does the liability depend upon any question of negligence of the landlord in the selection of the tenant, or of the tenant in selling the liquor. *Id.* Although the person to whom liquor is sold is at the time apparently a man of sober habits, and, so far as the vendor knows, one whose appetite for strong drink is habitually controlled by his reason and judgment, yet, if it turns out that the liquor sold causes or contributes to the intoxication of the person to whom the sale or gift is made, under the influence of which he commits an injury to personal property, the seller and his landlord are by the act made jointly and severally responsible. The element of care or diligence, on the part of the seller or landlord, does not enter into the question of liability. The statute imposes upon them both the risk of any injury which may be caused by the traffic. The liability sought to be imposed by the act is of a very sweeping character, and may, in many cases, entail severe pecuniary liability, and its language may include cases not within the real purpose of the enactment. The owner of a building who lets it to be occupied for the sale of general merchandise, including wines and liquors, may, under the act, be made liable for the acts of an intoxicated person, where his only fault is that he leased the premises for a general business, including the sale of intoxicating liquors, in the same way as other merchandise. The liability is not restricted to the results of intoxication from liquors sold or given away to be drank on the premises of the seller. *Id.* There is no way by which the owner of real property can escape possible liability for the results of intoxication, where he leases or permits the occupation of his premises, with the knowledge that the business of the sale of liquors is to be carried on on the premises, whether alone or in connection with other merchandise, or whether they are to be sold to be drank on the premises or to be carried away and used elsewhere. His only absolute protection against the liability imposed by the act is to be found in not using or permitting the premises to be used for the sale of intoxicating liquors.

In *Bertholf v. O'Reilly*, *ante*, an action was brought against the defendant, as the landlord of hotel premises, leased with knowledge that intoxicating liquors were to be sold therein by the lessee, to recover the value of a horse owned by the plaintiff, which died in consequence

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of having been overdriven by the plaintiff's son while in a state of intoxication, produced in part by liquor sold him by the lessee at his bar on the leased premises. The lessee had no license to sell intoxicating liquors, but it was understood between him and the defendant, when the lease was made, that a license was to be procured, and the defendant informed him that he would see that he had one. The plaintiff recovered a judgment which was affirmed on an appeal to the general term. From this judgment of affirmance the defendant appealed to the court of appeals. And it was held that all the elements of the landlord's liability under the act existed in this case, viz.: the leasing of premises with knowledge that intoxicating liquors were to be sold thereon; the sale by the tenant, producing intoxication; and the act of the intoxicated person, causing injury to the property of the plaintiff.

In whose favor.—In *Franklin v. Schermerhorn*, *ante*, it was held that the legislature intended, by the civil damage act, to give a single right of action, and single damages to one person; but a right of action is given, or may arise to a husband or wife, and each of their children, be they ever so many, as well as to the other persons named in the statute. Where the husband of the plaintiff was a cripple and could earn but little for the support of his family, consisting of the plaintiff and four children, and he received a quarterly pension of \$54, and, on the day of its payment, got intoxicated in part at the defendant's house, and thereby lost or had stolen \$50, it was held that, under the statute, the wife was only entitled to recover her proportionate share of the damages.

In *Mullen v. Christian*, 22 W. Dig. 59, an action was brought for alleged injury to means of support resulting from the intoxication of plaintiff's father, caused by a sale to him of intoxicating liquor by the tenant of a hotel owned by appellant. Plaintiff was three years old. He was dependent upon his father for support, whose capacity for labor and means of provision have, by his physical disability occasioned by his intoxication, been reduced two thirds, and such provision was dependent on the wages of his labor. Plaintiff's mother had before recovered judgment for the same injury. His parents have other infant children. It was held that it was not necessary to join the mother and the other infant children in this action; and that the mother's former judgment, if admissible in evidence, would not bar the action.

In *Secor v. Taylor*, 41 Hun, 123, the principle laid down in *Mullen v. Christian*, 22 W. Dig. 59, that the judgment roll in an action brought by the mother against the same defendant, is not admissible in a subsequent action brought by a child for the same injury, was limited to cases where exemplary damages are not sought. Punitory damages

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are not given to the plaintiff as a matter of right, but are awarded against the defendant, as a matter of punishment. The law uses the suit of a private party as an instrument of public protection, not for the sake of the suitor, but that of the public.

A person selling intoxicating liquor is not rendered liable to have awarded against him in civil actions damages but once, as and for a punishment of the same offense. *Id.* If a half dozen actions are brought, each jury cannot be permitted, in addition to compensatory damages, to add such sum as suits their fancy by way of punishment. Even if, under such circumstances, exemplary damages could be awarded in every action relating to the same transaction, no matter how many might be brought, the defendant would be entitled to have the prior judgment or judgments before the jury in order that they might know how much punishment had been already inflicted, as an aid in determining how much more, if any, ought to be meted out to the defendant. *Id.*

In this case, an action was brought by a minor, by his mother as his general guardian, to recover damages for injury to his means of support occasioned by the death of his father by means of intoxicating liquors sold to him by a lessee of the defendant. Upon the trial, the defendant offered, but was not allowed, to prove that the mother had already recovered a judgment against the defendant for damages sustained by the death of her husband, caused by the same intoxication, and that the amount thereof had been paid to her. And it was held that the evidence was properly excluded on the ground that no claim was made in the case for any exemplary damages.

Two separate, wrongful acts, or acts giving a cause of action, do not warrant a joint action or joint recovery. *Morenus v. Crawford*, 15 Hun, 45. So two separate sales by the defendants severally do not prove an allegation of a joint sale by them. In such case, the plaintiff may possibly be allowed to elect, and to recover against one or the other of the defendants. See *Blossom v. Barrett*, 37 N. Y. 436; *Winterson v. Eighth Ave.*, 2 Hilt. 389.

Damages. Elements of.—In *Quain v. Russell*, *ante*, it was held that it was not essential to the existence of a cause of action, under the civil damage act, against the vendor of liquors, that an action should also be maintainable against the intoxicated person; it is sufficient if the wife has been injured in her means of support through the intoxication of the husband. The case of *Hayes v. Phelan*, 4 Hun, 733, seems to be adverse to this holding, but an examination of the correction in 5 Hun, 335 will show that no such principle was adopted by the court. In *Baker v. Pope*, *ante*, 5 N. Y. S. C. 102, the contrary view is taken, though it is obiter. In *Schneider v. Hosier*, 21 Ohio, 98, it is distinctly held that the loss of means of support of the wife, through the intoxi-

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cation of the husband, gives to the wife a cause of action against the vendor of the liquor.

In *Quain v. Russell*, 12 Hun, 376, an action was brought to recover damages, under the civil damage act, by the wife of the person to whom the liquor was sold. The plaintiff owned a small piece of land; had six minor children under her care; the family was supported in whole or in part by the cultivation of her land by her husband, and by his labor performed for others; he squandered her money during his debauch; fell downstairs and was injured so that he was unable to help himself or labor for about four weeks, during which time the plaintiff was in destitute circumstances and suffered for want of food and fuel. And it was held there was evidence tending to show, and in fact showing, that the plaintiff was injured by her husband's intoxication in her person, property and means of support, and that the jury were well warranted in finding in that regard in the plaintiff's favor.

In *Hill v. Berry*, 75 N. Y. 229, it was held that an action is maintainable under the civil damage act by a wife to recover damages for loss of means of support in consequence of the intoxication of her husband.

In this case, the defendant was a hotel keeper, occupying a building leased to him by the other defendant for that purpose, and assisted in the sale of intoxicating liquors. Plaintiff lived with her husband and depended upon him for her support and maintenance. The defendants, at diverse times, sold to plaintiff's husband intoxicating liquors whereby he became intoxicated, incompetent and unfit to care for himself, or to work or pursue his accustomed labor, in consequence of which the plaintiff was deprived of her means of support and maintenance, and was obliged to do out-of door work ordinarily done by her husband, when not intoxicated, and was obliged to care for him when intoxicated. Her husband, while so intoxicated, remained away from home a number of days, in which time he spent a large sum of money needed for the support of plaintiff and family. Plaintiff's counsel, on opening the case, stated substantially the above facts, and the complaint, on motion, was dismissed. And it was held that the facts constituted a cause of action.

In *Stevens v. Cheney*, 36 Hun, 1, an action was brought to recover damages which the plaintiff has sustained by injuries to his property or means of support by reason of the intoxication of his son. The defendant Carter was the owner of the hotel, and leased the same to the other defendant for hotel purposes. Plaintiff's son was a married man of the age of thirty-one years. He drank strong and spirituous liquors sold to him by the lessee at the bar of the hotel, and became so intoxicated that on his way home, he, in consequence of such intoxication, was run over by the cars, making it necessary to amputate both of his

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legs. He has always lived with the plaintiff. And it was held that, in order to recover damages for an injury to his means of support, the plaintiff must show, either that the son was poor and possessed no means of his own, so that the plaintiff would be legally bound to support and maintain him for the future, and that, by reason thereof, the plaintiff would be without means of support for himself; or, that he himself was a poor person, unable to support and maintain himself, and that his son was legally bound to support him; and that, in the absence of proof of these facts, the plaintiff was properly nonsuited.

It was further held in this case that the taking of the footboard out of the bedstead for the purpose of properly treating the amputated limbs of the son, is not such an injury to property as will permit a recovery, for the reason that the intoxication was not the proximate cause of the injury to the bed. In order to entitle the party to recover for injury to property, the intoxication must be the proximate cause of the injury.

In *Volans v. Owen*, *ante*, it was held that the civil damage act creates a cause of action for an injury not before remediable by action and works a change by extending the remedy, so as to make the vendor of liquor and the landlord, under the circumstances specified in the act, liable for injuries committed by an intoxicated person, instead of confining the remedy to the immediate wrong-doer, according to the general rule of the common law. Both direct and consequential injuries are plainly included in the remedy given, and the legislature, by giving a right of action for injury to means of support—a cause of action unknown to the common law—evidently intended to create a new ground and right of action. The case of a husband, having a wife and family dependent upon him for support, and who, by reason of intoxication, becomes incapacitated to labor, and neglects to provide for them, or squanders his substance, and reduces thereby his family to penury and want, is within the act, though the facts would not constitute an actionable injury before the statute. *Id.* It is quite plain that cases of this kind were in the contemplation of the legislature. The words, "means of support" in connection with the designation of the persons, in whose favor the remedy is given, *viz.*: husband, wife, child, parent, etc., denote that it was not alone a common law injury, or an injury before remediable by action, to which the statute was intended to apply. *Id.* In this case, plaintiff's minor son, a young man about twenty years of age, living with his father, procured at various hotels and saloons in Ogdensburg, intoxicating liquors, and becoming intoxicated fell and injured his head, became sick, and for several months, was confined to his bed. The plaintiff was subjected to medical and other expenses, and was deprived, during the time, of the services which the son had been accustomed to render him upon

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his farm. He owned and cultivated a farm of over 100 acres. It does not appear whether he depended for his support upon the proceeds from the farm, or that the labor of the son was necessary for this purpose, or that the charges to which he was subjected diminished his income below the amount required for his support. The defendants sold to the son part of the liquor which caused his intoxication. And it was held that plaintiff was not entitled to recover, in the absence of proof that his son's services were necessary to his support or that the charge brought upon him diminished his means so as to render them inadequate therefor.

The words "means of support," are new in legal enactments, and have no settled legal meaning. Where injury to "means of support" is the gravamen of the action, the plaintiff, in order to maintain the action, must show that, by or in consequence of the intoxication or the acts of the intoxicated person, his accustomed means of maintenance have been cut off or curtailed, or that he has been reduced to a state of dependence, by being deprived of the support which he had before enjoyed.

The primary purpose of the legislature, in giving a right of action for an injury of this character, was the protection of the dependent and helpless. Diminution of income, or loss of property does not constitute an injury to means of support, within the fair intendment of this statute, if the plaintiff, notwithstanding, has adequate means of maintenance, from accumulated capital or property, or his remaining income is sufficient for his support. *Id.*

In *Sharpley v. Brown*, 43 Hun, 374, an action was brought by plaintiff to recover damages sustained by her by reason of her husband's death, alleged to have resulted from his intoxication, which was caused by liquor sold to him by one of the defendants, who was the tenant of the other defendant. The plaintiff, after remaining the widow of the deceased for a period of two and a half years, was married again and was living at the time of the trial with her husband, who gave her a better support than her former husband. The defendant proved this fact upon the trial without objection. The court subsequently, of its own motion, struck out this evidence, without any request on the part of plaintiff, but against the objection of defendant. The latter subsequently offered to prove the same facts, and the evidence was rejected. Judgment was entered in favor of the plaintiff from which the defendant appealed to the general term. And it was held that the evidence of the marriage of the plaintiff to another husband should not have been stricken out, and that defendant was entitled to have it considered by the jury on the question of damages.

The possession of another husband might be as useful to the plaintiff as the possession of accumulated capital or property, so far as her

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means of support were concerned. She could not have been in possession of another husband at her first husband's death; but if, shortly after the latter's death, she had come into the possession of such property as gave her an ample support, this fact might have been shown upon the trial.

Actions, under the civil damage act, are different from those of the character of *Terry v. Jewett*, of 78 N. Y. 338; *Kellogg v. N. Y. C. & H. R. R. R. Co.*, 79 Id. 72, and the like. In actions for common law injuries to the person, the damages would not be diminished by the possession of accumulated capital or property by the injured person. But, in this class of cases, the courts say that such possession, not merely might diminish the damages, but might altogether defeat the action. *Sharpley v. Brown*, *ante*; *Stevens v. Cheney*, *ante*.

In *Aldrich v. Sager*, 9 Hun, 538, an action was brought by a husband for injuries done to his wife by a son-in-law, while in a state of intoxication and in consequence of such intoxication, whereby he lost the services of his wife and incurred expenses for medical attendance, nursing etc. And it was held that the loss of the wife's services and the necessary expenses incurred in taking care of and curing her of her injuries were proper elements of damage, which the husband could recover under the civil damage act, upon a proper case made. The husband has an ownership in her services and ability.

It is true the statute does not, in expressed terms, give the right of action upon the cause of death. It does not define the injuries meant to be recovered, or enumerate them. It says, generally, injuries to persons, property, or means of support, in consequence of the intoxication of any person. *Jackson v. Brookins*, *ante*. If death ensues, as the natural and legitimate result of the intoxication, it is covered by the language of the statute. All injuries are covered that are consequent upon the intoxication. If death was excluded, the minor and temporary injuries would be provided for, while the greatest and most permanent of all would not be included. The statute ought not to be so construed. It admits of the fuller construction, which is more consonant with its benign purposes. Its main object was to provide a remedy for cases before remediless. The statute under consideration provides a remedy for the carelessness and neglect, morally criminal, which were shielded under the license law. When the statute provided that a husband, wife, child, parent, or guardian might have a right of action for any injury to his or her means of support, in consequence of the intoxication of anyone, the legislature did not mean to provide for such causes of action only as before then already existed against the intoxicated person, but to provide a remedy for an evil entirely without redress before. The law does not provide how the injury to the means of support must be produced, in order to be actionable, when it

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is in consequence of intoxication. It is therefore without limit in this respect. In the face of an allegation that the wife has entirely lost her means of support in consequence of the intoxication, the statute should not be construed as though it excepted total loss by death. The manner and amount of the injury is entirely immaterial save as it may affect the question of damages.

The civil damage act provides for a recovery by action for injuries to person or property, or means of support, without any restriction whatever. *Mead v. Stratton*, 87 N. Y. 498; *Volans v. Owen*, *ante*. While a statute of this character should not be enlarged, it should be interpreted, where the language is clear and explicit, according to its true intent and meaning, having in view the evil to be remedied and the object to be attained. The evident object was to suppress the sale and use of intoxicating liquors, and to punish those who, in any form, furnish means of intoxication, by making them liable for damages which might arise, and which were caused by the parties who furnished such means. If the injury, which results to the deceased, in consequence of his intoxication, disabled him for life, or to such an extent as to incapacitate him for labor and for earning a support for his family it would be embraced within the meaning and intent of the statute. That death ensued in consequence thereof, furnishes a stronger ground for a claim for a loss of means of support; and a different rule in the latter case would make provision for the lesser and temporary injury, while the greater and more serious would be without any remedy or means of redress. If it is an injury which can be repaired by damages, as that arising from a temporary disability, or one where death comes as a natural and legitimate consequence of the intoxication, a case is made out within the statute which entitles the injured party to recover such damages. *Mead v. Stratton*, *ante*. In this case, the hotel was owned by the defendant Margaret M. Stratton the wife of the other defendant. She took title, and she and her husband went into possession, before the passage of the civil damage act. She had general charge of the house, except of the bar, and knew that intoxicating liquors were there sold. It was held that the fact that possession was taken before the act was passed did not exempt her from liability; that the presumption was that the possession originally taken was continued in view of the laws of the state thereafter enacted. The statute does not provide that the person must not only own, but rent the premises; but if there is either an owning or renting with knowledge, it is sufficient to create a liability. It is not important whether the strict relation of landlord and tenant existed, if Mrs. Stratton was the owner, and permitted her husband to occupy with the knowledge that he was engaged in the business of selling intoxicating liquors.

In *Hayes v. Phelan*, *ante*, it was held that a complaint, alleging that

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the death of plaintiff's husband was caused by intoxication, produced by liquors sold to him by defendant, and that by his death plaintiff had sustained damages, in being deprived of the companionship of her husband and of the customary support and maintenance of herself and children, did not state a cause of action under chap. 646 of the Laws of 1873. See same case, 5 Hun, 335.

In *Brookmire v. Monaghan*, 15 Hun, 16, it was held that the decision in *Hayes v. Phelan*, 4 Hun, 733; 5 Id. 335, that damages in consequence of the death of the intoxicated person are not recoverable under the act of 1873, must control the general term of the third department, until the court of appeals shall have determined it to be erroneous, though a different view has been expressed in the fourth department in *Jackson v. Brookins*, *ante*.

Exemplary.—The fact that the defendant is selling liquor without a license may be considered as a basis for exemplary damages. *Davis v. Standish*, 26 Hun, 606. The statute in giving a right of action makes no distinction between the licensed, and the unlawful, selling of liquor; but it does authorize the recovery of exemplary, as well as compensatory, damages. As the act has not stated in what cases punitive damages may be given, the common law must be looked to for this purpose. In view of the rules of the common law, the legislature intended them to apply to actions brought under the statute, and the circumstance that the defendant, in selling the liquor which produced intoxication and the resultant injury, was acting in open violation and defiance of law, may be considered by the jury as a foundation for giving exemplary damages. *Id.*

In *Quain v. Russell*, 12 Hun, 376, it was held by the general term in the third department, that in an action under the statute, the defendant's license to sell liquors was admissible in evidence, not as a bar to the action, but to mitigate damages.

In *Reid v. Terwilliger*, 116 N. Y. 530, an action was brought by the plaintiff to recover damages, under the civil damage act, to her means of support, occasioned by the death of her husband in consequence of intoxication, produced by drinking intoxicating liquors sold to the deceased by the defendant McLaughlin, in a hotel stand owned and leased by the defendant Terwilliger. From a judgment of affirmance in favor of plaintiff, the defendant Terwilliger alone appealed. The question upon the appeal was whether the plaintiff, upon the evidence, was entitled to recover exemplary damages against the appellant.

The substance of the statute is that whenever the person, property or means of support of certain classes of persons shall be injured by any intoxicated person, or in consequence of the intoxication of any person, they shall have a right of action, and the person who shall have sold or given the liquors causing the intoxication in any degree, and

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any person owning, renting or permitting the occupancy of the premises having knowledge that liquors were to be sold therein, shall be liable severally and jointly for the injury, for all damages sustained and for exemplary damages.

The legislature has in this statute defined the elements of a new cause of action and who may be liable for it. It, however, made no change in the rules of ascertaining and determining the damages, or the limits of liability in the newly created causes of action, but left them subject to the existing rules of damages and to the facts established upon the trial. It may be reasonably presumed that the legislature, knowing that it was giving a cause of action for a new additional wrong, and wishing to stamp this wrong with the same character as other wrongs, declared from the outset, and without waiting the doubtful or dilatory action of the court, that exemplary damages might be recovered in this class of actions. The legislature did not intend to go further than to place this wrong upon the same plane with other wrongs where exemplary damages may be recovered, when the evidence upon the trial will justify such damages in accordance with well established and recognized rules.

The language of this statute, in respect to exemplary damages, is alike applicable to both vendor and owner, and does not relieve the plaintiff from providing the requisite personal facts to recover exemplary damages against the owner. The fact that the legislature has enabled the injured party to bring a joint action against the vendor of the liquor and the owner of the premises, does not affect the decision of the question under consideration.

In *Reid v. Terwilliger*, 116 N. Y. 530, it was held that a critical examination of the language of the civil damage act will suggest to a mind familiar with legal principles that the legislature has created, and intended to create a cause of action, or a right to recover damages, for an injury where one did not exist before, and to apply to such new cause of action an existing remedy. See *Volans v. Owen*, *ante*; *Mead v. Stratton*, *ante*.

The jury in this class of cases have power to give exemplary damages, but they clearly should not be allowed to do so in ordinary cases where nothing is proved but the simple sale of a single glass of liquor under ordinary circumstances. *Franklin v. Schermerhorn*, *ante*. They should only be given when there are circumstances of abuse or aggravation in the case proved on the part of the vendor of the liquor. *Id.* Where the plaintiff's husband was not intoxicated solely by liquor sold him at the defendant's house, but, in the same afternoon and evening, he had purchased and drank liquor at three other places before he drank at the defendant's hotel, the case was held not to be one for exemplary damages. *Id.*

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In *Ketcham v. Fox*, 52 Hun, 284, the defendant Dickerson was the owner of a hotel at Rome, and the other defendant conducted it as his lessee. The plaintiff claimed that the lessee, or her agents, at divers times, furnished intoxicating liquor to her husband, causing his intoxication, in consequence of which she was injured in her person and means of support. The main question in the case is, whether the owner is liable for exemplary damages, upon a case being made that would warrant their recovery against the lessee. The affirmative of this proposition was held by a divided court in *Reid v. Terwilliger*, 42 Hun, 310. It was, however held, in *Rawlins v. Vidvard*, 34 Hun, 205, where the action was against the landlord alone, that exemplary damages could not be awarded without proof of aggravating circumstances with which the defendant was connected. In the latter case, it was shown that the defendant had knowledge that intoxicating liquors were to be sold, and circumstances were also proved sufficient to authorize the award of exemplary damages against the tenant, but this was held not to be enough as against the landlord. It is difficult to see how the landlord would be any more liable, in case the action was against him and the tenant jointly than he would be in case the action was against him alone. In this view, the *Rawlins* case is an authority substantially adverse to the ruling in the *Reid* case.

It is now quite definitely settled that exemplary damages are not recoverable in every case where a cause of action is made out, but that circumstances of abuse or aggravation must be shown. This proposition seems to be recognized in *Neu v. McKechnie*, 95 N. Y. 632. If the tenant is to be deemed the agent of the landlord, the latter will not be liable for exemplary damages, unless in some way assenting to or responsible for the aggravating circumstances that furnish the occasion for such damages. The right to recover exemplary damages is not made to depend, as against the landlord, entirely on the act of the tenant, or that the landlord had some knowledge of what the tenant was doing.

Exemplary damages are expressly allowed by statute, where there is evidence upon which they may be awarded. *Neu v. McKechnie, ante*. In this case, the defendants were manufacturers of lager beer.

They had no license to sell it in quantities less than five gallons. The sale to the plaintiff's father was of this description, and hence unlawful. They had so dealt for a long time, and with many persons, and it resulted in their pecuniary benefit. Under the circumstances of the case, it was held to be a question for the jury to say whether something more than actual damages should not be allowed for the benefit of the community and for example's sake. To hold otherwise, would place a wrong-doer on the same footing with a licensed vendor—one who sells recklessly and at his own volition, on a level with one

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who has the consent of the proper public officials to deal in the article.

In *Rawlins v. Vidvard*, 34 Hun, 205, an action was brought, under the civil damage act, against the owner of premises by a wife to recover damages for injuries sustained by her husband by reason of the sale to him of intoxicating liquors by the defendant's tenant. The only connection of the defendant with the case was that he owned the premises where, the liquor, alleged to have caused the intoxication of plaintiff's husband, was sold, and that he let them to be used as a hotel, knowing that intoxicating liquors were to be sold therein. There was no proof connecting the defendant with any aggravating circumstances. The evidence tended to show that the barkeeper of the tenant sold to the husband of the plaintiff three drinks of whiskey at short intervals; but it did not appear that he was at all intoxicated until after he had swallowed the last of these drinks. And it was held that exemplary damages could not be awarded by the jury without proof of aggravating circumstances with which the defendant was connected.

Exemplary damages at common law implied malice, bad motives or evil intent on the part of the person against whom they were awarded. They were allowed, not to compensate the one who suffered the wrong, but to punish the one who inflicted the wrong on account of his evil design, and as an example to others.

If the legislature, in enacting the civil damage act, instead of employing the words "exemplary damages," had used the common law definition of those words, they would have expressed precisely what the statute means now. When thus construed, it does not mean that the jury may award exemplary damages in every case, but only when the defendant has acted from bad motives. For instance, if, in an action against the one who sold the liquor causing the intoxication, from which actual damages were sustained, it appeared that he sold in violation of law, or to a person whom he knew to be far gone in the habit of intemperance, or who was already obviously under the influence of liquor, or who habitually squandered in dissipation the wages with which he should support his family, the jury might well infer that the seller acted from bad motives, and award exemplary damages. So, in an action against the owner of the premises, if it appeared that he leased them to a tenant, knowing that he kept a disorderly place, or sold without a license, or to minors or habitual drunkards, there would be a basis upon which the jury might allow exemplary damages against him.

Under similar statutes, the courts of Michigan, Nebraska and Illinois require circumstances of abuse or aggravation to be proved before exemplary damages are allowed even against the seller.

In *Kreiter v. Nichols*, 28 Mich. 496, the court held that exemplary

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damages should not be awarded, unless the act of giving or selling the intoxicating drinks was willful, wanton, reckless or otherwise deserving of punishment beyond what the requirement of mere compensation would impose.

So in *Ganssley v. Perkins*, 30 Mich. 492, it was held that the actual damages should be as nearly commensurate with the actual injuries as the nature of the case will permit; and that exemplary damages should be given in those cases, and only in those cases, where the plaintiff has some personal right to complain of a wanton and willful wrong, which the wrong-doer, when he committed it, must be regarded as having committed against the plaintiff herself, in spite of the injury he must have known she was likely to suffer by it.

In *Roose v. Perkins*, 9 Neb. 304, though it did not appear whether or not there was any proof of aggravating circumstances, the refusal of the trial court to instruct the jury that exemplary damages could not be recovered, was held error.

The trial court allowed the jury to award exemplary damages in *Bates v. Davis*, 76 Ill. 222, and for this reason solely the judgment was reversed.

In *Hackett v. Smelsley*, 77 Ill. 109, exemplary damages were awarded, but the evidence tended to show that the defendant sold to an habitual drunkard.

But the supreme court of Ohio in *Schneider v. Hosler*, 21 Ohio, 96, under a statute creating a right of action against any person who shall, by selling intoxicating liquors contrary to said act, have caused the intoxication, etc., held that the jury might assess exemplary damages, without proof of actual malice or other special circumstances of aggravation. Under this act the sale was unlawful so that bad motives are to be inferred, and, in such a case, the legislature might well have intended to allow exemplary damages as a punishment to the defendant and a protection to society.

In *Reid v. Terwilliger*, 42 Hun, 310, an action was brought, under the civil damage act, to recover damages for the death of plaintiff's husband alleged to have been caused by liquor sold to him by a tenant of the owner of the premises. The seller and his landlord were jointly sued in the action. The landlord acknowledged that intoxicating liquors were to be sold in his building. A case permitting the finding of exemplary damages was made against the tenant. It was held that the common law would not, but the statute does, make the owner liable for exemplary damages. The test of such liability that the statute imposes upon the landlord is, not that he himself should have personally done any wrong with respect to the particular sale of liquor, but that he should have sustained the relation to his wrongdoing tenant which the statute defines.

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Rawlins v. Vidvard, ante, was an action against the landlord alone. In this case, the court held that exemplary damages could not be awarded against the landlord without proof of aggravating circumstances with which he was connected. It did not hold, and had no occasion to hold, that if both landlord and tenant had been sued jointly, and a case warranting exemplary damages had been made out against the tenant, the landlord would not have been jointly liable with him.

Remote and consequential.—In *Davis v. Standish, ante*, an action was brought, under the civil damage act, by plaintiff alleging that her husband came to his death by drowning, in consequence of having been intoxicated by liquor sold to him by the defendant, and that she was injured thereby in her means of support. Her husband went to the Canandaigua lake for the purpose of fishing, and thence to the public house kept by the defendant on the shore of the lake. He drank twice at the defendant's bar, and got a bottle of whisky of defendant, which he took on the lake with him in a boat hired of defendant, for the purpose of fishing, and on his return he again drank at defendant's bar at least ten times, and then started down the lake with another party in a small boat and was drowned. On the trial the defendant moved for a nonsuit on the ground that the liquor sold by the defendant to her husband was not the proximate cause of his death, but was, at most, only a remote and uncertain cause of such death, while other and more immediate and proximate causes intervened and caused such death. This position was based upon the assumption that the defendant when he sold the liquor, could not have anticipated that plaintiff's husband would go out on the lake again, as he had arranged for his passage home by the stage, and after such arrangement was made he was induced by his companion to change his mind and take the boat part of the way. The defendant claimed that the active agency of a third party in persuading plaintiff's husband not to go in the stage, but to go with him, was the more immediate and proximate cause of the drowning.

Where the intoxication is to such an extent as to deprive a man of the normal use of his faculties, either physical or mental, so that he is rendered incapable of caring for himself and of protecting himself from the results of accidents or circumstances to which he was subjected, and by reason of such deprivation of his natural powers of his body or mind, his death is produced by his inability to protect or defend himself against circumstances which threaten his life, it may be said in such cases, in general terms, that such intoxication is the proximate and direct cause of death. It is not necessary that the death, or the circumstances which immediately led to or produced it, should have been within the contemplation of the person who sold the liquor. The

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man who sells liquor to another, whether lawfully or unlawfully, is not protected against the provisions of the statute, because he does not, at the time he sells the liquor, contemplate that it will lead the man into circumstances where he is liable to lose his life. It is only necessary that the liquor sold or furnished should have produced either in whole or in part, a state of intoxication, and that such state of intoxication should have been the direct and proximate cause of the death, whether the circumstances, under which the death occurred, were within the possible or impossible contemplation of the party who sold or furnished the liquor.

In *Shugart v. Egan*, 83 Ill. 56, it was held that the seller of intoxicating liquor to a husband who becomes intoxicated thereby, and in consequence of his abusive language, is killed by a third party, is not liable in damages to the wife for his death. That decision was well put upon the ground that the intervening independent act of the third person was the direct and immediate cause of the death. See *Davis v. Standish*, *ante*. The unreported case of *Wright v. Read* was decided in the fourth department in March, 1881, upon the same principle. In this case, the husband of the plaintiff, while intoxicated by liquor furnished him by the defendant, went into a livery stable at night, and laid down upon the hostler's bed; and the hostler, coming in late in the night and finding him asleep killed him with an axe. The nonsuit of the plaintiff at the circuit was affirmed at the general term on the ground that the intoxication was not a proximate cause of the death.

In *Schmidt v. Mitchell*, 84 Ill. 195, the same principle was applied. There the defendant sold liquor to plaintiff's husband, whereby he became intoxicated, got into an affray, and was wounded, and by reason of his reckless disregard of the surgeon's directions, the wound became so dangerous as to lead the surgeon to amputate the leg, whereupon the husband died.

In *Krach v. Hullman*, 53 Ind. 526 the deceased, while intoxicated and lying in a wagon, driven by another person, who also was intoxicated, was fatally injured by a barrel of salt falling over on him. In case the injury was not the result of the inability of the deceased to protect or extricate himself by reason of his intoxication, the case was well decided upon the principle above mentioned. That it was not so caused, is to be inferred from the fact that the court, in its opinion in the case supposed, by way of illustration, the case of a man who, by reason of intoxication, lies down under a tree and a storm blows a limb down upon him and kills him, or lightning strikes the tree and kills him. In these several cases, the falling barrel, the falling limb and the stroke of lightning were intervening, independent, causes, directly

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producing the death, and their fatal effect was not owing to the victim's intoxication.

But in the case of *Davis v. Standish*, *ante*, the evidence warranted the conclusion that the drowning was the result of plaintiff's husband's inability to use his normal powers by reason of intoxication; and, if that was the case, the intoxication was the proximate cause of his death.

In *Neu v. McKechnie*, *ante*, an action was brought under the civil damage act. The verdict of the jury established that the plaintiff at the time the alleged cause of action accrued, was a child of the age of fifteen years, and was living with his parents and dependent upon his father for support, when the latter, in a state of intoxication, produced in part by the use of lager beer, sold to him by the defendants, murdered plaintiff's mother and then committed suicide. The defendants claimed that the act which deprived the plaintiff of his father, was not a natural consequence of the use of the sold beer by them, and that they were not bound to know that plaintiff's father would strike his wife on the head with an axe, and then cut his own throat with a razor. But it was held that the statute does not even require that the vendor shall know that drunkenness leads to crime of any degree, nor even that it is the cause of poverty and beggary, and consequent distress to the drunkard's family. It is enough that these results come from intoxication. The cause of action is neither taken away nor mitigated because the cause of injury also constitutes a crime. The jury are not to inquire whether the homicide or suicide are the natural, reasonable or probable consequences of the defendants' act. It is enough, if while intoxicated in whole or in part by liquors sold by the defendants, those acts were committed, if by reason of them, or either of them, the plaintiff's means of support were affected to his injury.

In *Becker v. Barnum*, 19 W. Dig. 95, it was held that the civil damage act makes no distinction whether the intoxication should be the direct or immediate, or slow or remote result of the liquor sold. The seller is made liable for acts affecting the person, property or means of support, in consequence of intoxication in whole or in part,

In *Beers v. Walhizer*, 43 Hun, 254, the plaintiff alleges that on a day named her husband provided for her support and maintenance; that the defendant sold him intoxicating liquors, which he drank and which caused him to become intoxicated, and that while so intoxicated, and in consequence thereof, he shot and killed one Banfield; that her said husband was immediately arrested for the said offense, tried, convicted and sentenced to confinement in a state prison for the period of his natural life; and that by reason thereof she was deprived of the support and maintenance furnished her by her said husband,

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and was thereby injured in her support, and means of support, in a large sum. After the jury were impaneled, the defendant moved that the complaint be dismissed for the reason that it did not state a cause of action, and the same was granted. From the judgment entered thereon, the plaintiff appealed to the general term. The defendant on the appeal claimed that it does not appear that the loss of the means of support sustained by the plaintiff was the direct result of the intoxication; that the arrest, trial and conviction of the plaintiff's husband which resulted in his imprisonment, were the cause that produced that result, and were wholly independent of the intoxication produced by the liquor sold by the defendant, and for this reason no cause of action was alleged within the provisions of the civil damage act. And it was held that the homicide committed by the plaintiff's husband was a crime punishable by imprisonment, and that his arrest, conviction and sentence were a result to be anticipated, as a matter of course, by the force and operation of the law of the land. His conviction was not the cause of his imprisonment, but was the result of the crime which he perpetrated, and that act was the direct and only cause in the eye of the law for his incarceration.

Under the civil damage act, it is necessary that two facts should concur, besides the sale or gift of the liquor by the defendant, to constitute a cause of action, to wit, intoxication resulting from its use in whole or in part, and the loss of the means of support by the plaintiff in consequence of such intoxication. The statute requires nothing more. *Beers v. Walhizer, ante*. The act itself establishes a rule of evidence applicable to and controlling in all cases arising under its provision, which in some respects is new, and has produced a radical change of the common law rule. *Id.* The statute makes no distinction whether the loss of the means of support is the direct or the remote result of the intoxication. It only requires that it should be established that the loss of the means of support is the result of such intoxication.

The civil damage act makes no distinction between cases in which the loss of the means of support is the direct result of the intoxication and those in which it is the remote result thereof. *McCarty v. Wells*, 51 Hun, 171. It only requires that it should be established that the loss of the means of support is the result of such intoxication. Both the direct and consequential injuries are plainly included in the remedy given. *Id.* The question is not whether the death of the deceased was the natural, reasonable or probable consequence of the defendant's act; but it is enough, if intoxication, caused in whole or in part by liquors sold by the defendant, was the cause of the death of the plaintiff's husband, if by reason thereof the plaintiff's means of

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support are injuriously affected. *Id.*; *Beers v. Walhizer, ante*; *Blatz v. Rohrbach*, 42 Hun. 402; *Volans v. Owen*, 74 N. Y. 529; *Mead v. Stratton*, 87 Id. 496; *Neu v. McKechnie, ante*.

Defenses.—In *Dubois v. Miller*, 5 Hun, 332, it was held that, in an action brought, under the civil damage act, by a wife for damages in the deprivation of her support, alleged to have resulted from her husband's intoxication, the admission of evidence of sales of liquor made to her husband prior to the passage of the act, is improper. And such error is not cured by the courts charging the jury that they cannot find any damages for anything that occurred prior to the passage of the act; as, while the intoxication which caused the damage might have occurred after, the liquor might have been furnished before such passage.

In an action brought against the defendant under the civil damage act the defendant offered to prove that, when he received his license the commissioners issuing it informed him that he could sell whisky under such license, and that he believed it; but the offer was objected to and excluded. And it was held in *McCarthy v. Wells*, 51 Hun, 171, that the evidence was properly excluded, as the question of exemplary damages was not involved in the case.

In *Ludwig v. Glaessel*, 34 Hun, 312, where an action was brought, under the civil damage act, to recover damages caused by the defendant having sold liquor to the plaintiff's husband, it was held that, where the defendant was compelled, upon his cross-examination to testify that he had shortly after the commencement of the action transferred all his property to his wife, the court erred in admitting the evidence. This was material to the issue and was likely to prejudice the jury as a kind of admission of defendant's liability. The conveyance to the wife might be fraudulent, or might be valid, as against creditors. But the defendant could not expect to try such question of fraud in this action and could not be prepared for that purpose.

In *McEntee v. Spiehler*, 12 Daly, 435, it was held that a complaint under the civil damage act must allege that the husband was an intoxicated person, and that the damage sustained was sustained by plaintiff in consequence of the intoxication.

In *Bertholf v. O'Reilly*, 8 Hun, 16, it was held that the principle of contributory negligence was not applicable to an action under the civil damage act. Nor did the sending of the horse on Sunday deprive the plaintiff of his right to sue and recover for his property unlawfully destroyed. See *Nodine v. Doherty*, 46 Barb. 59.

In *Elliott v. Barry*, 34 Hun, 129, it was held that if the wife contributes to the intoxication of her husband by consenting to the use by him of intoxicating liquor, and aiding him in procuring it or furnishing it to

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him, she is not entitled to recover for injuries sustained by her in her means of support by and in consequence of such intoxication.

Abatement and revival.—Under the authority of *Hegerich v. Keddie*, 99 N. Y. 258, it was held in *Moriarty v. Bartlett*, 99 N. Y. 651, that an action begun under the civil damage act by a widow to recover for an injury to her means of support, against a person who had sold intoxicants, who drank them, became intoxicated, and by reason thereof was drowned, was abated by the death of the defendant, and that it could not be revived and prosecuted against his representative.

In *Morenus v. Crawford*, 51 Hun, 89, an action was brought, under the civil damage act, to recover the value of a horse which was killed by decedent's husband, while intoxicated. The defendant kept a hotel where he sold liquors to be drank on the premises, and one Hoag kept another hotel for the same purpose; but they were not connected in business. The decedent brought this action against both defendant and Hoag, who separately answered, and recovered judgment against both defendants. This judgment was reversed upon the ground that a joint sale was alleged, and proof of separate sales did not establish a right to a joint judgment. An order was then entered permitting the action to be continued against the present defendant and discontinued as to Hoag. The second trial resulted in a judgment for plaintiff which was reversed because the plaintiff was permitted to prove that the defendant sold liquors without a license. The plaintiff died, and by order her administrators were permitted to continue the action. The third trial resulted in a judgment for plaintiff, and from this judgment an appeal was taken to the general term. And it was held that the action did not abate by the death of the former plaintiff and that its revival and continuance were legal. The plaintiff's intestate lost an article of personal property, which diminished her estate for which she had a right of action against her husband; and had such an action been brought it would not have been abated by her death. The civil damage act extends the liability to a person who contributed to the loss by doing a certain specified act. An injury to property is an actionable act whereby the estate of another is lessened. Subd. 10, § 3343, Code Civ. Pro. Under this definition, this action is for the recovery of damages for an injury to the plaintiff's property, and is saved by the Revised Statutes. See *Cregin v. The Brooklyn Crostown R. R. Co.*, 75 N. Y. 192; 83 N. Y. 595; *Brackett v. Griswold*, 103 N. Y. 428.

In *Ludwig v. Glaessel*, 34 Hun, 312, the plaintiff brought an action under the civil damage act, to recover damages caused by liquor sold to her husband, who while intoxicated fell into a canal and was drowned. He left four infant children, for whom a guardian was appointed by the surrogate. The guardian, with the approval of the surrogate, thereafter assigned all the children's right of action to the plaintiff. It was

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held that the claims are in their nature assignable, as the assignment was to the mother, on whom the duty of supporting the children had devolved by the father's death. The decision of the case, on this point, was based upon the authority of the case of *Moriarty v. Bartlett*, Id. 272; but that case has been reversed in the court of appeals. 99 N. Y. 651.

In *Moriarty v. Bartlett*, 34 Hun, 272, an action was brought by plaintiff, under the civil damage act, for selling intoxicating liquors to her husband and causing his intoxication, in consequence of which he was drowned. After the action was commenced, the defendant died. On motion of the plaintiff, the special term substituted the defendant's executrix in his place, who appealed from the order of substitution. The question was whether the cause of action survived against the estate of Bartlett, and it was held, at general term, that the action did survive and that the executrix was properly substituted. But on appeal to the court of appeals, reported in 99 N. Y. 651, the orders of the general and special terms were reversed, and the motion denied.

Extra-territorial.—The civil damage act gives a cause of action for an injury, and this, as it is a special statutory provision, must refer to an injury done in this state. It cannot be intended to have an extra-territorial effect. Its effect must be limited to the state. *Goodwin v. Young*, 34 Hun, 252.

In this case, a servant of the plaintiff, who was a resident of Vermont, took a team of horses belonging to his master, drove them into this state and there drank a glass of liquor at the defendant's store and purchased whisky there. He returned to Vermont in an intoxicated condition; put one of the team into the barn; left the barn door open and the wind blew in upon the horse and caused her sickness and death. In an action to recover the damages thereby sustained, under the civil damage act of this state, it was held that the said act only applied to cases in which the injurious act was done in this state.

Facts held sufficient to constitute such cause of action.—In *Blatz v. Rohrbach*, ante, an action was brought, under the civil damage act, to recover damages sustained by reason of the plaintiff's husband having committed suicide while intoxicated. The main question was, did this state of intoxication induce the suicide? The evidence tended to show that, after playing cards and drinking in the defendant's saloon, he arrived at home late in the evening, very much intoxicated; that the plaintiff after trying to quiet him went upstairs leaving her husband below, as it was not an unusual thing for him to sleep downstairs; that, in the morning, he was found hanging by the side of the closet door, having evidently committed suicide; that the deceased was the father of ten children, the youngest but a few weeks old; was addicted to strong drink, but made a comfortable living for his family; had for-

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merly attempted suicide, but whether at the time of making such attempt he was sober or not, did not appear; and that a paper was found containing the words "give my watch to my boy," and stating that his brother-in-law owed him \$57. A very sharp contradiction was made as to the condition of the deceased when he left the defendant's saloon. And it was held that a verdict finding that the suicide was the result of the intoxication would not be set aside by the appellate court.

This case went up to the court of appeals and is found reported in 116 N. Y. 450. An exception taken to the charge of the jury that the deceased drank intoxicating liquors that evening at defendant's saloon, raised the only question that the court deemed it necessary to discuss on the appeal, viz.: whether the term "beer," in the absence of all evidence as to its quality and effect, imports an intoxicating beverage.

A term, which includes both intoxicating and non-intoxicating liquors cannot be said, in its ordinary meaning, necessarily to imply an intoxicating drink, unless such import has been given to it by statute or by the decisions of the courts. The word was first introduced into our present excise law by chap. 549, Laws of 1875, which prohibited the sale without license in quantities less than five gallons of strong and spirituous liquors, wines, ale and beer.

If, on proof of the sale of beer without any evidence as to its character or quality, the jury is to be instructed that it is of the kind that intoxicates, the court assumes a fact not proven and the burden of showing that it is of a non-intoxicating character is put on the defendant. The court can indulge in no presumption in the case except as to the innocence of the accused; and, until it appears by sufficiency of proof that the particular beverage sold was of an intoxicating kind, the presumption of innocence controls the case. This rule applies, not only to prosecutions distinctly criminal, but also to penal actions, where the plaintiff seeks to charge the adverse party with a penalty or forfeiture, and is particularly applicable in an action under the civil damage act, where the consequences may be exceedingly disastrous to the defendant.

The jury cannot, therefore, on proof of a sale of beer, say that it was strong beer or intoxicating beer. It may be lager beer, and, if it is, they are not authorized on the proof to find for the plaintiff. The proper rule is to require, in all prosecutions for violation of the statute for selling beer, proof of the character and quality of the particular beverages sold. Full effect is thus given to the intention of the legislature to regulate the sale of those liquors which are intoxicating, and the rules that must apply to all prosecutions of a criminal character, are maintained. Even where the jury may very well find from the plaintiff's evidence that the particular beer drunk was intoxicating,

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the question cannot be withdrawn from their consideration, but they must be permitted to exercise their judgment upon it.

There must be evidence, and not mere conjecture, which shall show that acts of the defendant have caused, in whole or in part, the injury which the plaintiff has sustained. *Lovelan v. Briggs*, 32 Hun, 477. The mere fact that the defendant sells spirituous liquors, and that the deceased had been seen in defendant's store, or even had been seen coming from the store, in an intoxicated condition should not make the defendant liable. A man may keep a liquor store and yet may refuse to sell liquor to an intoxicated man. Unless the man was seen to go in sober and come out drunk, the condition in which he came out would not show where he obtained the liquor. *Id.* In this case, the only evidence connecting the defendant with the intoxication of plaintiff's husband was, that, two or three weeks before her husband's death he had drank a glass of ale at the defendant's store, and that he had been seen to come out of the store intoxicated two or three days before his death, and that his hat was left in the store. And it was held that the evidence was insufficient to sustain a verdict for the plaintiff, and that a nonsuit was properly ordered.

In *O'Connor v. Conzen*, 23 W. Dig. 533, an action was brought under the civil damage act. The defendant testified that he kept a liquor store during the time in question; that he knew plaintiff's husband to be a regular drunkard; that he had seen him in his place many times and never sober. Plaintiff testified that, at a certain time, she saw her husband drinking liquor in defendant's place; that he was brought home beastly drunk; that she repeatedly spoke to the defendant requesting him not to sell her husband liquor; that he disregarded her request; that after these occasions, her husband struck and otherwise abused her, and failed to render her support or contribute to it. Defendant denied that he sold or gave to the plaintiff's husband any liquor or intoxicating drink, or that he was notified by plaintiff not to sell her husband liquor. At the close of plaintiff's case, and again at the close of the entire testimony, a motion was made to dismiss the complaint, which was denied. And it was held that the refusal to dismiss the complaint was proper, as the evidence was sufficient to require a submission of the question to the jury. This case was affirmed on appeal to the court of appeals, and is found reported above.

In *Webb v. Wilson*, 23 W. Dig. 140, an action was brought, under the civil damage act, to recover for the death of plaintiff's husband. He went to the defendant's hotel about seven o'clock in the evening to get supper; was sober at the time; after he had procured supper, he went into the bar-room where he drank whisky; he drank six times and became intoxicated; he left there between eight and nine o'clock in the evening, and drove to another hotel where he stopped and pro-

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cured more drinks; that he went on a short distance further where the wagon tipped over and was found under it dead, with one of the wheels resting upon his breast. It was held that this evidence was sufficient to warrant a finding by the jury that the intoxication was the proximate cause of his death.

In *McCarty v. Wells*, *ante*, an action was brought under the civil damage act. The plaintiff sought to recover for the injury which she sustained to her means of support by the death of her husband. He was drowned, and his death is alleged to have been caused by his intoxication, which is claimed to have been produced, in whole or in part, by intoxicating liquors sold or given him by the defendant. There was no dispute that the deceased purchased and drank at least one glass full of whisky at the defendant's saloon on the evening before his death. A number of witnesses testified that, very soon after, he was so intoxicated that he staggered. Several witnesses for the defendant, who saw him at or about the same time, testified that he was not intoxicated. The question whether the liquor furnished by the defendant to the decedent caused his intoxication, either in whole or in part, was, upon the evidence, held to be one of fact to be determined by the jury, and that the court properly declined to hold as a matter of law that the evidence was insufficient to establish that fact. See *O'Connor v. Conzen*, *ante*.

In *Ackerman v. Betz*, 46 Hun, 677, an action was brought against defendant, under the civil damage act, for loss of support. Plaintiff testified that she had seen her husband at defendant's saloon on a hundred occasions, and that his condition at these times was nearly always one of gross intoxication; that she begged the defendant not to give him anything more to drink, and that the defendant then said: "Mr. Ackerman, go home; we do not want such men as you here; you are no credit to this place; and I promise you, Mrs. Ackerman, he shall never have another drop to drink in this place." She was corroborated by her daughter, and by other testimony of a similar nature. And it was held that there was sufficient evidence to warrant a jury in finding that the intoxication of the plaintiff's husband, when at the defendant's saloon, was caused in whole or in part by liquors furnished to him by the defendant or his agent, and that it was error to direct a verdict for defendant.

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HENRY SAMSON *et al.*, Respondents, v. JOSEPH FREEDMAN,
Appellant.

Court of Appeals, June 1, 1886.

Account stated. Presumptive.—An account of sale of goods, which consists of few items, and upon which, after its receipt, payments have been made by the purchaser, is an account stated, and the law raises from such facts an implied agreement to the correctness of the account. An account thus stated is not conclusive upon either party, but is only presumptively correct, and may be impeached for any error induced by fraud or mistake.

Action brought to recover a balance claimed to be due upon an account stated.

Appeal from an order of the general term of the court of common pleas of New York, receiving the judgment entered upon the report of a referee, and granting a new trial.

Melville H. Regensburger, for appellant.

James Dunne, for respondent.

EARL, J.—This action was brought to recover a balance claimed to be due upon an account stated. The answer to the complaint is substantially a general denial. There is not much dispute about the facts, and they are substantially as follows: The plaintiffs were partners, carrying on a business in England, and the defendant was a merchant doing business in the city of New York. At various times during the years 1880 and 1881, the plaintiffs and defendant had dealings with each other, consisting of sales of merchandise by plaintiffs to defendant on credit, and of sundry payments to plaintiffs by defendant on account thereof. On the 1st of July, 1880, there was a balance due the plaintiffs from the defendant, upon their dealings, of

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£1,440 11s. 4d., and on the 27th day of the same month the plaintiffs shipped to the defendant upon his order nine cases of goods, which reached New York on the 9th of August, and were put into the custom house. These goods were invoiced at the agreed price of £679 8s. 6d., and were taken from the custom-house by the defendant as follows: Four cases October 4, 1880; and one case at each of the following dates in 1881: May 25th, August 27th, September 6th, October 5th, and November 5th. On the 4th day of January, 1881, the plaintiffs sent to defendant by mail a written statement of their account against him, in which he was charged with the balance due plaintiffs July 1st, and the invoice of goods shipped July 27th, and some items of interest and expenses, and he was credited with two payments of £500 each, made in August and November and which showed a balance due the plaintiffs of £1,169 0s. 8d. The account was inclosed in a letter, in which the defendant was requested, if he found it correct, to carry the balance forward to the new account in conformity, and to return the conformation inclosed, which was as follows:

“I beg to acknowledge the receipt of your account current showing a balance of £1,169 0s. 8d. per 31st December, 1880, in your favor, which I transfer to the new account in conformity. [Date and signature.]”

The defendant received these papers by mail in due course, but did not sign or return the proposed conformation. Subsequently the agent of the plaintiffs in the city of New York called upon the defendant in reference to the account, and on one of the occasions the defendant told him that he had remitted the whole of the account, except about forty pounds due for interest, and that he had requested of plaintiffs a statement. After receiving the account, on the 15th day of January, 1881, the defendant sent to the plaintiffs £500, which he requested to have placed to his credit. On the 21st day of February he sent ot them another sum of £500, and requested to have the

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same placed to his credit, and, in his letter inclosing the draft, he said :

“ There are still a few pounds due you, providing the goods still on hand (and I have quite a lot there still from your shipments) are up to the contract. I shall withdraw them shortly and determine all about it.”

On the 23d day of March he wrote a letter to the plaintiffs, notifying them that, upon investigation, the entire invoice of goods shipped July 27th was inferior to the samples upon which the goods were bought, and that he demanded as damages £847, 14s, 1d., and that the goods were held subject to their order on the payment of that sum. The defendant at no time disputed the correctness of the account, and never made any objection thereto except the one stated in his letter of March 23d.

The sole question for our determination is whether there was an account stated. We think the court at general term did not err in holding there was. The goods had been subject to the control and inspection of the defendant for five months before he received the account. He had had four cases of them in his actual possession for three months. The account was a short one, composed of few items. Immediately after its receipt he paid £500 thereon, a portion of which was necessarily applicable to the goods last shipped. More than a month later he sent another payment upon the account, in which he acknowledged that there was a balance still due, provided the goods still on hand were “ up to the contract.” There was no express agreement upon the account by a mutual looking over the same. But the law raises from such facts an implied agreement to the correctness of the account. *Lockwood v. Thorn*, 18 N. Y. 285, 292; *Stenton v. Jerome*, 54 Id. 484; *Quincey v. White*, 63 Id. 370, 377; *Young v. Hill*, 67 Id. 162, 172; *Sharkey v. Mansfield*, 90 Id. 227. An account thus stated is not conclusive upon either party, but is simply *prima facie* presumptively correct, and may be impeached for any error

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induced by fraud or mistake. Even by what was said in the letter containing the last payment, the defendant asserted that the account was correct, and the only right he reserved was to impeach it if the goods were not up to the contract. That right he would have had if it had been not expressly reserved. If he could show that upon subsequent examination he discovered for the first time that the goods were not up to the contract, he could have alleged the facts in his answer, and have recouped his damages. The plaintiffs did not place the defendant at a greater disadvantage by suing him upon an account stated than they would if they had sued him upon an open account for the goods sold, claiming the balance due, because by neither form of action could they cut off his counterclaim for breach of warranty, which was the only defense left to him, the goods having been received by him.

A stipulation appears in the record, allowing the defendant to amend his answer by setting up his damages, or to commence an action to recover his damages; plaintiff's attorney agreeing to accept service of process in such action; that action and this to be tried at the same time, before the same referee. The defendant did not avail himself of that stipulation, and it is therefore a just inference that he had no cause of action against the plaintiffs, and that, therefore, no injustice has been done to him by holding that there was a stated account, and thus that the balance claimed was *prima facie* presumptively due the plaintiffs.

We think the order of the general term should be affirmed, and judgment absolute ordered against the defendant, with costs.

All concur.

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JOHN MINGAY *et al.*, Appellants, v. HENRY B. HANSON
et al., Respondents.

Court of Appeals, June 1, 1886.

Municipal corporations.—The restrictions contained in the charter of the village of Saratoga Springs (section 61 of chap. 220, Laws of 1866), against the expenditure of money and the creation of a village debt, were repealed, as to the water commissioners of the village, by chap. 557, Laws of 1868, and chap. 763, Laws of 1872.

Action brought by certain taxpayers of the village of Saratoga Springs, to restrain the water commissioners of said village, from carrying out a contract with the Holley Manufacturing Company.

Appeal from a judgment of the general term of the supreme court, affirming judgment dismissing plaintiff's complaint.

Matthew Hale and *John R. Putnam*, for appellants, James Mingay and others.

Esek Cowen and *C. S. Lester*, for respondents, Henry B. Hanson and others.

EARL, J.—The restrictions contained in the charter of the village of Saratoga Springs (Laws 1866, chap. 220, § 61), against the expenditure of money and the creation of a village debt were repealed, as to the water commissioners of the village, by subsequent legislation (Laws 1868, chap. 557; Laws 1872, chap. 763), and hence the debt and expenditure complained of in this case were legal, and unassailable by the plaintiffs.

The reasons for our conclusions are so well stated in the opinions delivered at special and general terms, in the case of *People v. Leary* (17 Wkly. Dig. 116), that it is not required that they should be restated here.

The judgment should be affirmed with costs.

All concur.

Statement of the Case.

SAMUEL K. SCHWENK, Appellant, v. ROBERT NAYLOR,
Respondent.

Court of Appeals, June 1, 1886.

Reversing 50 N. Y. Super. 57.

1. *False representations. Sale of stock*.—A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent misrepresentation, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made; nor is it material in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it, for his individual benefit.
2. *Same. Examination of property*.—The vendee in such case, though present to examine the property, has a right to rely upon the representations of the vendor as to the extent and boundary of the property, and is not bound to examine the title when the vendor professes to know all about it and the extent of the property, especially when he cannot ascertain a knowledge of these matters by an examination.
3. *Same*.—The court of appeals refused to hold that a disputed and doubtful equitable title is equivalent to a clear and undisputed legal title, and that no damage can be sustained by the substitution of the former, for the latter, title by means of a fraud.

This action was brought to recover damages claimed to have been sustained by plaintiffs by reason of fraudulent representations made to them by defendant by means whereof plaintiffs were induced to purchase from him two-thirds of a mill property in Florida, or of the capital stock of a corporation, to which said property had been conveyed by defendant.

Appeal from a judgment of the general term of the New York superior court, affirming judgment for defendant,

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that the complaint be dismissed, entered upon the direction of the trial judge.

A. R. Dyett and Joseph Fettretch, for appellants.

Wm. B. Putney, for respondent.

RAPALLO, J.—This action was brought to recover damages claimed to have been sustained by the plaintiffs by reason of fraudulent representations made to them by the defendant in November 1880, whereby the plaintiffs were induced to purchase from him two-thirds of a mill property in Florida, or of the capital stock of an incorporated saw-mill and lumber company organized under the laws of this state, to which said property had been conveyed by defendant, and to furnish the sum of \$15,000 for operating the mill and business of the company.

The representations alleged in the complaint were that the defendant was the holder or owner of all the capital stock of said company, and that the company owned and had title to about thirty-five acres of land situated at Apalachicola, Florida, having thereon a large and valuable saw-mill, with its machinery, etc., and also having an extensive water front of over 2,000 feet on Turtle harbor, with large and commodious wharves, all of which property was of the value of \$125,000, and that the said mill was and could be made very profitable, and would yield a profit of \$100,000 a year; that the lands of said company included, as a part thereof, and of said water front, the whole of a dock extending in length 250 feet, or thereabouts, in a southwesterly direction along the shore of Turtle harbor, and a tramway leading from the mill to the dock, and the land upon which said dock and tramway were situated, and all the land adjoining, extending, in a southwesterly direction from the mill, to a certain ditch or creek which the defendant showed to the plaintiff, Kilpatrick, and represented to him was the

boundary line of the city of Apalachicola, and were part of and used in connection with said mill.

The complaint further alleged that the whole of said dock and tramway, so represented by the defendant to be included in the lands of said company, were material and necessary to the mill, and the operation thereof, and that without the same the mill could not be successfully and profitably operated; that, believing and relying upon said representations, the plaintiffs were induced by the defendant to enter into an agreement with him to take and purchase two-thirds of the capital stock, and to provide and furnish the sum of \$15,000 to operate the mill, and did also, at the request of the defendant, furnish and advance further sums, which the defendant represented to be necessary for the operation of said mill and business; and that such advances were induced by the representations alleged to be false and fraudulent. The representations were alleged to be false in this: that the lands of said corporation did not, as the defendant then well knew, include the whole of said dock and tramway, nor the whole of the land on which they were situated, nor any of said dock, tramway, or land, except a small and inconsiderable part thereof, nor did the land of the company, as the defendant then well knew, include all the land which the defendant represented that the same did include, nor was the ditch or creek, before mentioned, the boundary line of the city of Apalachicola, and that said false representations were fraudulently made, with intent to deceive and defraud the plaintiffs.

The complaint further alleged that, as part of the agreement, the defendant took charge of the mill and business at Florida, and the plaintiffs paid out, for the purpose of said business, in addition to the \$15,000 first mentioned, the further sum of \$20,000 on the faith of said false representations; that said mill and property, without the whole of said dock, tramway and land, were worth \$35,000 less than they would have been worth had the representations

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been true, and they would not have entered into the agreement, or furnished any of the money, or purchased the stock, if they had known that the representations were false, and they claim damages to the amount of \$35,000.

The answer admitted the making of the agreement alleged in the complaint; and stated that, at the time it was made, the defendant owned or controlled all the capital stock of the company, but denied the false representations charged, and set up other matters of defense.

On the trial, the plaintiff Kilpatrick was called as a witness on his own behalf, and produced a written agreement between himself and his co-plaintiff, Schwenk, of the one part and the defendant of the other part, dated November 11, 1880, whereby the defendant agreed to sell to the plaintiffs, and they agreed to purchase, one undivided third interest each, of and in the mill and machinery therein, unfinished tug, real estate, and all other property at Apalachicola, Florida, belonging to said Naylor, on the following terms, viz.: That the plaintiffs should provide and furnish \$15,000, as required for working the mill and business effectually; that all profits of the business for three years should belong to Naylor, in payment for said two-thirds interests, except \$55,000, which should be paid to the plaintiffs out of two-thirds share of profits; that a company having been already incorporated under the laws of the state of New York for the purchase and working of the mills, the sole control of which was then in the hands of the defendant, the capital stock of said company should be divided equally between all the parties to the agreement, immediately upon said working capital being furnished; that the defendant having furnished a list of the property and machinery at Apalachicola, which list was attached to the agreement, the only condition of the contract was that all the property stated in said list should be found there when the plaintiffs, or one of them, should visit the mill, and, if not so found, they should be free to withdraw from

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the agreement should they so determine; that one of them should visit the mill within thirty days, or the condition should be deemed waived, and the property be considered finally accepted by them. The agreement contains other provisions not important to the present inquiry. Attached to the agreement was a list entitled, "Machinery in saw-mills and premises at Apalachicola, Florida, belonging to R. Naylor." Then follows a minute inventory, covering several pages, of the various articles of machinery, but the only reference to the real estate was: "These saw-mills have an extensive water front of some 2,000 feet immediately on Turtle harbor, with wharf, etc." "The site comprises about thirty acres." The log pond will store 10,000,000 feet of logs." "The buildings comprise large saw-mill, 50 by 150 feet; two stories." Engine and boiler houses, 40 by 60 feet."

The plaintiff Kilpatrick testified that the defendant made representations to him at the time the agreement was made; that the defendant stated to him the condition of the mill, the formation of the company, the necessity of capital to complete the machinery, and its worthlessness in its then present condition, but its capacity of being made very profitable with a small outlay of money; and the witness proceeded to set forth the negotiation which ensued. The witness testified that the defendant stated that the water front embraced docks from 500 to 600 feet long; that the water front attached to the mill, and available for its use, was at least 2,000 feet, and that already a dock had been built, 500 or 600 feet long, on the portion of the water front adjoining the mill; that after the agreement had been executed, the witness went down to the mill, where the defendant had preceded him; that he found the mill there, and the heavy machinery, and the defendant took him down to the dock and pointed out what he said was the water front, and the line between the town of Apalachicola and the mill property, which ran to the line of the town; that he pointed out a

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little creek, from 800 to 850 feet south of the mill, and besides that, in the distance, a little bay or ditch, that formed the line between the town of Apalachicola and the mill property; that the witness was accustomed to measure distances with his eye, and he should judge that from the end of the dock to that line was about 800 feet, and they agreed that, if they had so much land on that side of the mill, it was abundant room for all practical purposes; that when the defendant made these representations to the witness in regard to the wharf and the lines of the city of Apalachicola, he (witness) believed them, and did not doubt them for a moment, and then returned to New York, having authorized the defendant to draw upon him for the required funds; that this wharf and the tramway, which ran the whole length of the wharf, were indispensably necessary for the operation of the mill; that to the north of it was all swamp land.

From the testimony of this witness it appears that the wharf, as then standing, was about 250 feet long, part of it having been previously carried away; that the line pointed out to him by the defendant as the line between the mill property and the city of Apalachicola was about 800 feet south of the south end of the wharf, and about 1,000 feet south of the mill, but that, as he afterwards ascertained, the line between the mill property and the city was in fact only about thirty feet south of the mill, and that there was left belonging to the mill property and to the company in fact only about thirty feet of wharf and water front south of the mill, instead of 1,000 feet of water front and 250 feet of wharf, while at least 800 feet of wharf was necessary to run the mill, and could not be obtained on the north side of the mill at a cost of less than \$50,000, owing to the location and character of the property.

The witness further testified that in January, 1882, the defendant being then in New York, the witness had a conversation with him, in which witness said to him: "Mr. Naylor, I have learned that the property embracing the docks and tram-

ways has been purchased by you, and taken in your name and that you personally have not conveyed the property to the mill company, but that you have sold it;” and that the defendant replied: “I will never convey it in the world. You can’t make me. I have conveyed it to another party for fear of your getting it;” and witness thereupon called upon other persons who were present to take note of what the defendant said, and violent language then passed between plaintiff and the defendant. The witness further stated that he did not discover, until after October, 1881, that the wharf did not belong to the company, and after he had made large advances in addition to the \$15,000.

The plaintiff Schwenck corroborated the testimony of Kilpatrick. Schwenck testified that when the agreement of November 11, 1880, was made, the defendant represented that the property consisted of thirty-three to thirty-five acres, with a river front of about 2,000 feet, and extensive wharves to be used in the shipment of lumber; that the witness was present at the conversation in January, 1882, testified to by Kilpatrick; that Kilpatrick told the defendant that he had discovered that the lots which he had sold to plaintiffs, as a part of the wharf property belonging to the mill, had not belonged to defendant at the time he sold them to plaintiffs, and that afterwards he (defendant) had bought them in his own name, and so held them; and Kilpatrick said, “Mr. Naylor, you know you cannot do that;” and Naylor replied, “I have taken counsel in the matter, and I can do it;” and Kilpatrick said, “You will have to convey that to us;” and Naylor said he would not do it and Kilpatrick replied, “You will have to either do it or we will put you behind the bars;” that some other strong expressions were used, and Mr. Naylor said, “I will make you pay \$50,000 for those lots. I have already conveyed them to some one else to prevent your getting them.” On the cross-examination of Schwenck, the defendant put in evidence a contract dated January 18, 1882, between the defendant.

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and Schwenck, whereby the defendant agreed to sell to Schwenck, for \$15,000, one-third of the capital stock of the Central Florida Mill and Lumber Company, and to convey, or cause to be conveyed, to him, the real estate recently purchased by the defendant, and owned or controlled by him, contiguous to the land and improvements of the company, including that forming the wharf frontage, and furnishing the right of way for passing in and out, loading and unloading vessels, and Schwenck agreed to pay to Naylor any sum found due him for salary, or for money expended by him in carrying out the business of said company.

The plaintiff Kilpatrick testified that he never saw or knew or heard of this agreement before it was produced in court, and the plaintiff Schwenck testified that the agreement was never carried out.

Edward W. Kilpatrick, a son of the plaintiff, who was also present at the conversation in January, 1882, testified to by the plaintiffs, corroborated their testimony in that respect, and stated that in that conversation the plaintiff, Kilpatrick, said, "Mr. Naylor, do you know that there is a portion of this land which you represented as belonging to the property that did not belong to it?" and Naylor answered, "Yes;" and then followed the demand and refusal of a conveyance of that property, and the declaration of Naylor that he would make plaintiffs pay \$50,000 for it if necessary.

Charles H. Storking, another witness for the plaintiffs, who had gone to the property, stated, from declarations made to him in December, 1881, while in Florida, by Naylor, with a map then before them, that the property which Naylor claimed to own individually took away from the mill property all but about fifty feet of the wharf. The deed to Naylor of this property was put in evidence, and bore date September 8, 1881.

The foregoing, together with the deed from Naylor to

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the company, dated January 15, 1880, constituted the substance of all the evidence, and at the close of the testimony the defendant moved to dismiss the complaint, but no ground for such dismissal is stated in the case.

The judge presiding at the trial granted the motion, assigning as reasons that the representations were not made concerning the stock, but concerning the length of the water front and the size of the dock; that upon these representations the plaintiffs parted with their money, not to the defendant for his individual benefit, but to him to be used in the improvement of the company's property, and the money was so used; that it was not proved that all the representations were untrue, and therefore the only remedy the plaintiffs had was to rescind, and recover back their money on a tender back of the stock; that they could not sue in affirmance of the contract and for partial damages, because it was necessary, in such a case, as in the case of a warranty, that the false or fraudulent representations should have been made concerning the article for the inferiority of which the recovery is sought; that the sale in this case was of the stock, and, as the representations were not made concerning the stock, there was no cause of action for false and fraudulent representations; that as to the length of the dock the plaintiffs could see for themselves before they parted with any money, and need not have been misled, and as to the deficiency in the water front the evidence was insufficient to establish the fraudulent character of the representations at the time they were made, as the parties might well have been mistaken as to the boundaries.

We think that, although the interests purchased by the plaintiffs were conveyed to them by means of a transfer of the stock, the contract was in substance for a sale of two-thirds interest in the property; the defendant representing himself as holding the entire interest, in the form of stock. The contract of sales states in terms that the defendant

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agrees to sell, and the plaintiffs agree to purchase, one undivided, third interest each, in "all that mill, and machinery therein, unfinished tug, real estate, and all other property at Apalachicola, Franklin county, Florida, belonging to said Naylor, on the following terms." A list of the property was furnished and attached to the contract, and one of the conditions was that the property in the list should be found at the mill. The contract recited that this property was represented by stock in the company, which had been formed for the purpose of operating the mill, the sole control of which was in the hands of Naylor, and that the stock of that company was to be equally divided between the three parties. That mode of transferring the interests sold, did not, however, change the substance of the transaction, which was a sale of two-thirds interest in the property described.

It is quite immaterial, however, whether the sale was of the property or of the stock. A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent misrepresentation, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made; nor is it material, in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it, for his individual benefit. If known to be false, and made with intent to deceive and defraud the person who is thereby induced to pay out his money, the person guilty of the fraud is liable to respond in damages, on the same principle on which one person is held liable in damages for fraudulently giving a false recommendation by which another is induced to give credit to a third party.

In the present case, however, the money advanced by the

plaintiff was proved to have been paid to the defendant, and there is no evidence showing what disposition he made of it; but, even if he did expend it in the improvement of the company's property, he reaped an individual benefit, to the extent of at least one third of it, as he was the owner of one-third of the stock of the company, and, according to his own statements, the effect of the advance was expected to be, to make his stock, which without the improvements, was worthless, yield a large profit, and he had a strong personal interest in inducing the plaintiffs to make the advance.

The next ground of nonsuit, as to the dock, cannot be sustained. The plaintiff Kilpatrick saw the dock, but it is not correct to say that he could not be misled. According to his testimony he was misled. What he saw was a long dock running southerly from the mill, with a tramway extending its entire length. To the extent of about 250 feet it was in good repair, but beyond that a part had been carried away, leaving piles still standing, and beyond the 250 feet the defendant pointed out to him a water front of about 800 feet which he represented to belong to the mill property, and to be on the mill side of the city line, while, according to the defendant's own admission to the witness Storking, only about 50 feet of this wharf and water front belonged to the company, and the rest was claimed by the defendant to belong to him by virtue of a purchase made by him subsequent to the sale to the plaintiffs, and for this property he declared to the plaintiffs, in 1882, that he would compel them to pay \$50,000 and stated to them that he had conveyed it to another party to prevent them getting it.

The representation on which the property was sold was well calculated to mislead, as the 250 feet of wharf was still standing, and the residue of the water front pointed out was marked by physical objects, while, as testified to by Kilpatrick, there was nothing on the land to indicate the city line, and if he had examined the deed from the plaintiff to the company, put in evidence, he could not have discovered

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from its description anything except that the property was bounded on the south by the city line, of the location of which he knew nothing except what was represented by the defendant, the description in the deed being by section numbers. Kilpatrick was only two days at Apalachicola, and could not be presumed to know the location of the city line. He suggested to the defendant, at that time, that he would like to employ a lawyer to examine the records, but the defendant said that he had all the papers straight, and it was all right, and he had a perfect title; that he had paid his money, and knew what the property was. Under these circumstances, we are of opinion that the plaintiff had the right to rely upon the representation of the defendant as to the extent and boundary of the property. All that, by the terms of the contract, he had undertaken to do was to see that the property was there as represented. He saw it before him, but was not bound then and there to examine the titles, especially when the defendant professed to know all about it and the extent of the property. *Whitney v. Allaire*, 4 Denio, 555; *Allaire v. Whitney*, 1 Hill, 485; *Beardsley v. Duntley*, 69 N. Y. 577.

The last ground of nonsuit was that, as to the deficiency in the water front, the evidence was insufficient to establish the fraudulent character of the representations at the time they were made, that the difficulty arose from the boundary line, and as to that the parties might well be mistaken. We think that, under the evidence, this was eminently a question for the jury. The evidence of the statement of the defendant (which the jury might infer was made for the purpose of deterring Kilpatrick from employing a lawyer) that he had the papers all straight, and had a perfect title, and had paid his money, and knew what the property was, was pertinent to this point; and, coupled with the facts that when, in September, 1881, the property deficient was put up for sale in Florida under the decree of the probate court, he knew enough to buy it; and his admission, testified to

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by Edward W. Kilpatrick, that he knew that there was a portion of the land which he represented to the plaintiffs as belonging to the property that did not belong to it, without any qualifications as to the time when he had such knowledge; his taking the trouble to consult a lawyer when he bought the deficient property as to whether he could hold it against the company, and his resorting to the plan of conveying it away to prevent the company getting it; and his threat to compel the plaintiff to pay \$50,000 for it—these circumstances, unexplained as they are in the case as now presented to us, tend to show bad faith on the part of the defendant, and to make out a strong chain of evidence for submission to the jury on the questions of guilty knowledge and fraudulent intent.

At general term a new and different ground, not assumed by the judge at the trial, was taken for affirming his conclusion. The principal point not already answered was that the plaintiffs had not shown any damage from the false representations; that there was no proof, and the description in the deed from Naylor to the company, unexplained, did not show that the land in dispute was not contained in the deed; that the company was in possession of the land in dispute (which fact was not clearly shown); that there was no substantial testimony that the company did not own the 2,000 feet of water front and the wharf as represented, except the fact that the subsequent purchase by Naylor. These points are sufficiently answered by the testimony of Storking and the admissions of Naylor.

But the main ground taken by the court is that, by the implied warranty in the agreement of purchase of November 11, 1880, and the express warranty in the deed from Naylor to the company, the company became, by estoppel, the owner of the equitable title to the land in dispute, and that the consideration of the last conveyances to Naylor having been paid with the money of the company, or of the plaintiffs (a fact of which there was no proof), made him

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the trustee for the one whose money was paid; that, although he had admitted that he had conveyed away the property, there could be no *bona fide* purchase from him, because the possession of the company was notice of its rights, and the purchaser would take subject to that notice. This seems to us a rather strained argument by which to sustain what, upon the case as presented, in the absence of any explanation, the jury might have pronounced a gross fraud. In the first place, the evidence as to possession by the company of the disputed premises is very indefinite. It does not show what, if any, business was carried on at the mill, or to what extent the company were in possession of or occupied the water front. But whatever possession there was, was through Naylor, who did not leave the property till December, 1881, which was after his purchase of the water front. Up to that time he was the apparent possessor of the property; and there is nothing to show that the rights of the company, or that he was its representative, was generally or at all known in Apalachicola. The company was a private corporation, organized in New York, and it is, to say the least, very doubtful whether, under the circumstances, the possession of Naylor would be notice to the world of any rights but his own, and whether there could not have been a *bona fide* purchase from him. To hold that a disputed and doubtful equitable title, such as is suggested in the opinion of the general term, is equivalent to a clear and undisputed legal title, and that no damage could be sustained by the substitution of the one for the other by means of a fraud, is going further than we are inclined to follow.

The judgment should be reversed, and a new trial ordered, costs to abide the event.

All concur.

DANIEL R. LIDDY, Appellant, v. LONG ISLAND CITY, Respondent.

Court of Appeals, June 8, 1886.

Undertaking on appeal.—Where the appellant, to whom leave was granted to file an undertaking on appeal, *nunc pro tunc*, filed such undertaking and mailed notice thereof to respondent's attorney on August 7, 1885, a notice of exception to the sureties mailed on August 27, was properly served within ten days, and appellant failing to cause his sureties to justify, cannot retain his appeal.

N. T. Payne, for appellant.

James M. Lyddy, for respondent.

PER CURIAM.—Leave was granted the appellant to file an undertaking on this appeal, *nunc pro tunc*, and such undertaking was filed, and notice thereof given to the respondent's attorney, who resided at Long Island City, on August 7, 1885, by depositing the same, properly directed, in the post-office of the city of New York, where the appellant's attorney resided.

The proof shows that the respondent's attorney excepted to the sureties and mailed notice thereof to the appellant's attorney, addressed to him at New York city, in the post-office at Long Island City, on the 17th day of August, 1885. This notice was properly served within ten days, even without the allowance of the double time authorized in case of the service of the precedent notice by mail (section 798, Code of Civ. Pro.), and required the appellant to cause the sureties on his undertaking to justify, in order to retain his appeal. This he did not do. Code of Civ. Pro., § 1335.

The appeal should therefore, be dismissed, unless the appellant perfect his undertaking within twenty days from

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the service of this order, and pay ten dollars costs of this motion.

All concur.

In the Matter of the Estate of JACOB H. DEYO.

Court of Appeals, June 8, 1886.

Affirming same case, 36 Hun, 512.

1. *Decree on final accounting. Laches in moving to vacate.*—It is within the discretion of the surrogate to refuse to vacate a decree on final accounting entered nine years prior to the application, upon the ground of laches on the part of the petitioner in prosecuting his remedy.
2. *Same. Conflicting evidence.*—The fact that the existence of the alleged mistake and error in the original accounting was determined by the surrogate against the petitioner upon conflicting evidence, is conclusive in the court of appeals against the appellant.

Appeal from an order of the supreme court at general term, affirming an order of a surrogate, denying a motion to set aside a decree upon final accounting of executors, and for a new accounting, on the ground of mistake.

A. T. Clearwater, for Jonathan Deyo, one of the executors, appellant.

Lewis H. Hasbrouck, for John Titus, Jr., one of the executors, and Jacob H. Deyo, a legatee, respondent.

RUGER, Ch. J.—Several conclusive reasons exist why the order of the court below should be affirmed; and it would be sufficient to mention but one of them were it not for the conviction entertained by us that the controversy arises out of an honest misunderstanding on the part of the parties, and the hope that a few words of explanation may reconcile a difference which would never have occurred but

for the inexperience of the parties in the method of keeping their accounts.

The parties were executors of the will of Jacob H. Deyo, who died in 1871, possessed of property to the amount of about \$13,000. This property was converted into money, and the assets were nearly equally divided between the two executors. In 1874, an accounting was had before the surrogate between them, and it was adjudged that about \$7,500 had come to the possession of the petitioner, and about \$5,500 to the hands of the respondent.

An inventory of the property of the estate was produced, and the items of receipts and disbursements by each of the executors were stated in detail, and the decree of the surrogate was made, passing the accounts as stated. Nine years thereafter one of the legatees, becoming of age, cited the executors to account before the surrogate; and upon the disclosures made upon that accounting the petitioner conceived the idea that he had been wronged in the settlement of the account previously made by the surrogate, and filed this petition to vacate and set aside the decree then made, upon the sole ground that he had not been credited in his account for the sum of \$3,635, alleged to have been paid by him to his co-executor from the proceeds of certain government bonds belonging to the estate.

The inventory shows that the estate possessed \$4,500 of such bonds, and the proof shows that these bonds were sold at an advance of about twelve per cent. and netted \$5,040. Some uncertainty exists as to the place of custody of these funds prior to the accounting in question, and as to the method by which they came to the possession of the respective executors, but the accounts presented to the surrogate conclusively show that eventually the respondent received \$3,675 of them, and the petitioner only \$1,365, and that they each fully accounted for the respective sum received by them. It is entirely immaterial whether the respondent received \$3,675 directly from his co-executor, or through a

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joint check drawn and signed by the two, or by the check of any other temporary custodian of the fund. He did in his accounts acknowledge the receipt of the money, and was charged with it, and has fully accounted for it.

The petitioner received \$1,365 of such moneys only, and that amount only has been charged to him. There is no dispute but that he received such amount, nor but that such sum is the entire amount which has been charged to him. From these circumstances it is entirely clear that he ought not to be credited in his accounts with any part of the sum of \$3,675. The idea seems to have been for some time mutually, and probably honestly, entertained, by each of the respective parties hereto, that he did not have all the moneys to which he was justly entitled; but we think this notion grew out of their unfamiliarity with the method of keeping accounts, and the misleading weight which they gave to circumstances which were in fact unimportant. The petitioner believed that some, if not all, of the sum of \$3,675 was paid to his co-executor by his check, or, through his agency, and that, therefore, he was entitled to credit therefor; but this, of course, was not so unless he can show that a similar sum was somewhere charged to him in the accounts, and we have seen that this has not been done. The accounting in 1874 was had at a time when the transactions were comparatively fresh in the recollection of the parties, to which they mainly trusted; and we have every reason to believe, after a careful examination of the subsequent evidence, and of the inventory and account presented at that time, that the adjudication then made was substantially correct. It would therefore seem, upon the merits of the controversy, that the prayer of the petitioner was properly denied.

It was also quite within the discretion of the court below to refuse the relief prayed for upon the ground of laches on the part of the petitioner in prosecuting his remedy, and their determination of that question would require the dis-

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missal of the appeal or the affirmance of their order by us.

Of course the fact that the existence of the alleged mistake and error in the original accounting was determined against the petitioner upon conflicting evidence, would also be quite conclusive against the appellant here.

The order should therefore be affirmed, with costs.

All concur.

LOUISA BELTER, as Executrix, etc., Respondent, v. HANNAH LYON *et al.*, Appellants.

Court of Appeals, June 8, 1886.

Mortgage. Foreclosure.—The plaintiff, who purchased at a foreclosure sale under an arrangement that the sale was to take place in due and lawful form, and to be an effective and real sale, and that if she, or any one for her, became purchaser, she should go into possession as such; but that at any time within one year after taking title, she should reconvey to the defendant upon being paid the mortgage debt and interest and subsequent expenditures, is entitled to a deed from the referee, and is not liable to account as a mortgagee in possession; and an order requiring the delivery of the referee's deed, and denying the motion for an account, is properly granted.

Appeal from an order of the general term of the court of common pleas, affirming an order of the special term requiring the referee in foreclosure to deliver to plaintiff a deed of the premises, and denying a motion of defendant for an account of the rents of the said premises, and the surrender of the premises on payment of the balance due, or for the sale of the premises.

W. J. Marvin, for appellant.

W. B. Hornblower, for respondent.

PER CURIAM.—Whether the foreclosure sale at which the plaintiff's son was the highest bidder proceeded, by agreement of the parties, upon the basis of a right of purchase secured to the mortgagor, or was meant to be ineffective and inoperative if the plaintiff, or some one representing her, became the highest bidder, because of the defective title, and the consequent danger of a sacrifice, is a question of fact about which the parties widely disagree, and the affidavits presented are extremely contradictory. A letter, however, written by the attorney who represented both parties in the endeavor to perfect the title, and sent to the defendant, seemed to the general term the most reliable evidence of the agreement actually made, and the only prudent basis on which to solve the dispute. In that conclusion we are disposed to concur. The letter indicates, as the real arrangement made, that the sale was to take place in due and lawful form, and be an effective and real sale, and not a sham; that if the plaintiff, or any one for her, became purchaser, she should go into possession as such; but that at any time within one year "after taking title" she should reconvey to the defendant upon being paid the mortgage debt and interest, and subsequent expenditures named.

Upon any construction of this letter, the plaintiff is entitled to a deed from the referee, and is not liable to account as mortgagee in possession, since she is in as purchaser. The order made requiring the delivery of the referee's deed, and denying the motion for an account, was therefore correct and must be affirmed.

But this determination leaves open the question of the rights of Mrs. Lyon under the contract for repurchase. She is at liberty to seek to enforce it; and the inquiries whether, upon a correct construction of the agreement, she will be in time or too late, the extent and nature of the contract, and its validity and obligations, are left open to be

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determined in such action or proceeding as may be instituted for that purpose.

The order should be affirmed, with costs.

All concur.

THE UNION TRUST COMPANY OF NEW YORK, Respondent,
v. WILLIAM H. OLMSTEAD, Appellant.

Court of Appeals, June 15, 1886.

Mortgage. Foreclosure. Part of premises in another state.—The supreme court of this state has jurisdiction, in an action to foreclose a mortgage, to decree a sale of the whole of the mortgaged premises, though a portion thereof lies in another state. The court may order the mortgagor, if subject to its jurisdiction, to execute a conveyance in aid of a sale under the decree. Such order, though not originally demanded, can be granted by way of amendment, even after the report of sale.

Appeal from an order of the supreme court at general term, reversing so much of an order of the special term as denied a motion to amend the decree of foreclosure therein, *nunc pro tunc*, by inserting therein a provision requiring the mortgagors to execute to the purchaser a deed of the mortgaged property.

McNaughton & Olmstead, for appellant.

Miller, Peckham & Dixon, for respondent.

DANFORTH, J.—The plaintiff sought by foreclosure and sale to enforce a mortgage executed by the defendant corporation. The supreme court had jurisdiction over the cause of action and the parties; and its decree is valid, although part of the premises covered by it are in another state. Its writ may not be operative there, nor its judgment capable of execution as against that portion of the

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property ; and for that reason the court might have required the mortgagor to execute a conveyance to the purchaser, in order that the whole security offered by the mortgage should, so far as possible, be made effective. *Muller v. Dows*, 94 U. S. 450.

This was not done, but the power of the court was not exhausted, and what it might have ordered in the first instance, it could still require by amendment. The order appealed from goes no further than to carry out the intention of the parties to the mortgage, as ascertained by the decree ; it relates to a matter within the jurisdiction of the court, and its exercise is not the subject of review.

The appeal should, therefore, be dismissed.

All concur, except MILLER, J., absent.

PHILIP REMBE, Respondent, v. THE NEW YORK, ONTARIO
AND WESTERN RAILWAY COMPANY, Appellant.

Court of Appeals, June 8, 1886.

Affirming same case, 32 Hun, 68 Mem.

1. *Negligence. Questions for the jury.*—A railway company has a perfect right to lay down its track across a highway, but is bound to exercise proper care and skill in the performance of the work and to restore the highway, as far as practicable, to its former condition, so as to render it safe and not impair its usefulness ; and while it is engaged in this work, it is also its duty to prevent any obstruction to persons passing, so far as that can be done. It is liable for negligence in this respect, in case the plaintiff's negligence does not contribute to the result ; and defendant's negligence and plaintiff's contributory negligence are questions for the consideration of the jury.
2. *Same.*—In an action to recover damages for personal injuries suffered from driving over defendant's track at a point where it was constructing its track across the highway, the question whether

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plaintiff erred in his judgment, or could in any way have avoided the accident by any greater degree of care than he exercised, is one for the jury to determine; and their finding upon the questions of negligence and contributory negligence, is conclusive upon the court of appeals.

Action to recover damages alleged to have been caused by defendant's negligence.

Appeal from judgment of the general term of the supreme court, affirming judgment in favor of plaintiff.

P. B. McLennan, for appellant.

Abram A. Demarest, for respondent.

PER CURIAM.—The defendant, at the time of the injury sustained by the plaintiff, to recover damages for which this action is brought, was constructing a portion of its road by laying down a track across a public highway in Rockland county, and in restoring the highway by making a crossing over the tracks. The ground was level at this point, and the ties were being laid upon the ground, and the rails then fastened, and the spaces between the rails filled in with plank. The top of the rails and the surface of the crossing were about eleven inches above the natural level of the ground. The planking was completed between the rails, and two planks had been laid down on the end of each tie on both sides of the track, and then, to allow wagons to pass over a plank was set aslant against these two planks on each side. A wagon had a short time before passed over in safety. Plaintiff came up with a high baker's wagon, and asked when he could get across. The foreman in charge of the work told him he would let him over as soon as he could. The plaintiff being somewhat deaf, did not hear the reply. A second request was made to wait for a moment, but he did not heed it. He swears that he saw the planks there, and, as far as he could see, it was all right, and that is the reason he went on. Then the foreman requested one

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of his men to take the horse by the head, and lead him over, which he did. When he had reached the opposite side, and was passing down the sloping planks, the horse started, and ran against a post, when the man let loose, and then ran across the highway against a telegraph pole, and upset the wagon and injured the plaintiff. The horse had previously run away, and on that day acted wild and skittish.

The defendant had a perfect right to lay down its track across the highway, but was bound to exercise proper care and skill in the performance of the work and to restore the highway, as far as practicable, to its former condition, so as to render it safe and not impair its usefulness.

While engaged in the work it was also the duty of the defendant to prevent any obstruction to persons passing, so far as that could be done. If chargeable with negligence in this respect, the defendant would be liable therefor, if the plaintiff's negligence did not contribute to the result.

These were questions for the consideration of the jury. There was evidence upon the trial showing that there were planks upon the opposite side of the railroad from where the plaintiff stood, standing on edge which might have caused the plaintiff's wheel to drop suddenly and thus frighten the horses. Whether this or the accelerated motion of the wagon caused the accident was a question for the jury; and also whether the manner in which the plank was located was negligence was for their consideration. At the time of crossing, one of the men at work had hold of the horse, as the testimony shows; and this also was for the jury to consider in determining the question as to the defendant's negligence.

In view of the facts presented, and as the jury have found that defendant was chargeable with negligence, their finding in this respect is conclusive against the defendant.

As to the contributory negligence of the plaintiff, it is not entirely clear that he was in fault. Although he proceeded to drive his team across before he heard any response to his

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question, he had reason to suppose he might pass in safety. In fact one of the workmen took hold of his horse and might have stopped him, if the passage had not been considered entirely safe; and it is not apparent that the plaintiff could not have passed in safety, but for the condition of the plank at the end of the crossing.

The question whether he erred in his judgment, or could in any way have avoided the accident by any greater degree of care than he exercised, was one for the jury to determine, and we cannot say that they erred in their finding that the plaintiff was not chargeable with contributory negligence.

It may also be remarked that the plaintiff might not have seen the condition of the crossing at the side opposite from where he was, and he had reason to believe from the act of one of defendant's workmen, in leading the horse over, that the crossing was in a condition entirely safe.

The judgment should be affirmed.

All concur.

MARIA ENO, Respondent, v. RUFUS DIEFENDORF, Appellant.

Court of Appeals, June 1, 1886.

Affirming *Eno v. Diefendorf*, 31 Hun, 456.

1. *Action for accounting. Settlement. Question of fact.*—Where, in an action for an accounting, defendant claims that he has made settlements with plaintiff by giving her promissory notes, and it does not appear that he has rendered any account of the items of moneys in his hands or demands due the plaintiff at the time of the alleged settlements, and the proof shows that he admitted at different times certain amounts which he owed the plaintiff, and that he gave his promissory notes therefor, and it was found by the referee that he was indebted to the plaintiff for an amount far exceeding the sums named in said notes, the referee did not err in not giving legal effect to the settlements, or permitting them to be opened

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- without charge or proof of fraud or mistake, and the most that can be claimed is that a question of fact was presented as to whether any settlements had taken place.
2. *Same. Requests to find.*—In the absence of any request to find that any settlement or settlements had been made, or any reference to any fact or facts relating to either of the alleged settlements, the case is without any findings as to a settlement or settlements which raise any such question for the consideration of the court on appeal.
 3. *Same. Limitations.*—An answer which sets up that the defendant has settled and paid plaintiff for all deal, accounts, matters and things he has ever had with plaintiff, and denies that he is indebted to her in any sum whatever, and that more than six years have elapsed since the matter and things mentioned in plaintiff's complaint, or any of them, have become due, contains merely a defense of payment, and is not a sufficient plea that the claims and demands of the plaintiff are barred by the statute of limitations.
 4. *Same.*—Where mutual accounts exist between the parties, and some of the items accrued within six years before the commencement of the action, the statute of limitation has not run against any of them.
 5. *Same.*—Payments made at different times upon the account, if any is made within six years before the commencement of the action, prevents the statute from running.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered upon the report of a referee in favor of plaintiff in an action for an accounting between partners.

S. N. Doda, for appellant.

F. A. Lyman, for respondent.

. PER CURIAM.—The complaint in this action alleged that the plaintiff's husband and the appellant were copartners, that plaintiff was sole legatee and devisee of her husband; who died in 1866; that after the death of plaintiff's husband the appellant received moneys, notes and accounts belonging to the plaintiff and for her use; that she loaned him moneys, and he refused to render an account, and settle for the same, and was indebted to her in the sum of \$5,000 by reason

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thereof. The complaint also alleged an assignment by the appellant to one J. H. I. Diefendorf, (but as the complaint was dismissed as to this party the allegation in that respect is not material.) The complaint then demanded an accounting between the plaintiff and the defendants, and that the defendants pay her the balance that may be found due on such accounting.

Various answers were interposed to the complaint, and upon the trial before a referee he found in favor of the plaintiff, and against the appellant, for a balance of \$3,189.36, and, upon an appeal from the judgment entered thereupon to the general term, the same was affirmed.

The main point presented upon this appeal to which our attention is directed, is that the referee erred in not giving legal effect to the settlement proven by the uncontradicted testimony of the parties, and in permitting such settlements to be opened without charge of fraud or mistake in the complaint, or proof thereof on the trial. This involved a question of fact before the referee, in regard to which the evidence was conflicting, and it is not apparent that the referee passed upon the same contrary to the weight of the evidence, or that his finding in this respect was without sufficient testimony to sustain it. The alleged settlements mainly related to the giving of certain promissory notes, but in each instance the evidence fully explained the facts and circumstances under which these notes were given, and the most that can be claimed is that a question of fact was presented as to whether any settlements had taken place. There was no proof that was absolutely conclusive that such was the fact. It does not appear that the appellant rendered an account of the items of moneys in his hands or demands due the plaintiff at the time of the alleged settlements. The proof shows that he admitted at different times certain amounts which he owed the plaintiff, and that he gave his promissory notes therefor.

There was evidence proving, and it was found by the

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referee that the defendant was indebted to the plaintiff for an amount far exceeding the sums named in the notes referred to.

We are thus brought to the conclusion that there was no sufficient proof that settlements were made between the parties which precluded the plaintiff from establishing what was actually due her from the defendant.

There is another answer to the point now urged as to settlements being made between the parties.

No requests were made to find that any settlement or settlements had been made, or any reference made to any fact or facts relating to either of the alleged settlements.

The case, therefore, presented by the requests is without any findings as to a settlement or settlements which raise any such question for the consideration of the court upon appeal.

There is no merit in the claim that the notes of the defendant to the plaintiff were barred by the statute of limitations. No such defense is properly presented in the defendant's answer. The second and further answer sets up that the defendant has settled and paid plaintiff "for all deal, accounts, matters and things he has ever had with plaintiff, and denies that he is indebted to her in any sum whatever, and that more than six years has elapsed since the matter and things mentioned in plaintiff's complaint, or any of them, have become due."

This allegation contains merely a defense of payment, and is not a sufficient plea that the claims and demands of the plaintiff are barred by the statute of limitations.

There is no direct averment that the defendant intends to set up two defenses, in one count of the answer. Even if there had been a sufficient statement of more than one defense it would be in violation of the rule of pleading, that the defenses must be separately stated.

Aside, however, from this view of the subject it is sufficient to say that there is no averment, in appropriate

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language, that six years before the commencement of the action have elapsed since the demands named were due; and hence they are not barred by the statute of limitations.

Another answer to the claim is that the case is one where mutual accounts existed between the parties, and that some of the items accrued within six years before the commencement of this action.

It may also be remarked that the evidence shows that payments were made by the defendant at different times upon the account of the plaintiff, and thus the statute was prevented from running.

The question as to the right of the plaintiff to maintain the action in her own name is sufficiently answered in the opinion of the general term.

No other point urged demands comment.

The judgment should be affirmed.

All concur.

In the Matters of the Application of the COMMISSIONERS OF THE STATE RESERVATION AT NIAGARA, to take certain lands.

Court of Appeals, June 22, 1886.

See same case, 37 Hun, 537.

Appeal.—An appeal cannot be taken to the court of appeals from an order of the general term of the supreme court, affirming a special term order, confirming a report of the commissioners of appraisement of land to be taken for the Niagara park reservation.

Appeal from an order of the supreme court, at general term, which affirmed an order of the special term, confirming the report of commissioners of appraisement, appointed under, and in pursuance of, chap. 386, Laws of 1883.

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Ansley Wilcox, for motion.

Calvin Frost, opposed.

We think we are concluded by the decisions under the general railroad act from entertaining this appeal. There is no such difference between the language of that act and the language of the act under which these proceedings were instituted as to require or authorize a different construction of the two acts. There is no public policy and no reason for authorizing appeals to this court under the one act which do not apply to the other. Decisions which have been so long and uniformly adhered to should not now be departed from or disregarded.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. JAMES W. CLARK, Appellant.

Court of Appeals, June 22, 1886.

Affirming same case, 38 Hun, 214.

1. *Evidence. Error cured.*—An error in the rejection of competent evidence is cured, if the excluded fact is afterwards fully proved, or an opportunity given to the injured party to secure an answer from the witness to the very inquiry which had been previously excluded.
2. *Same.*—Such error is also cured by the proof of the facts sought by the testimony of another witness, and giving the party the full benefit of all possible inferences to which they lead.
3. *Juror. Competency.*—A juror who has an impression as to the guilt or innocence of the prisoner, if he testifies that he will be governed by the evidence, and his previous impression will not influence his verdict, and that it is his belief that he can render an impartial verdict according to the evidence, and that he will give the prisoner the benefit of every reasonable doubt, and acquit him, if such doubt exists, is competent within the established rule.
4. *Separate trial.*—The right of the prosecution to try a prisoner

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separately is fixed by statute, and no error was committed in directing the prisoner to be tried separately from the others indicted with him.

5. *Cross-examination*—How far the cross-examination of a prisoner, as a witness on the trial, may be carried, is necessarily very much in the discretion of the court.

Appeal from a judgment of the general term of the supreme court, affirming a judgment of conviction for obtaining property by means of false and fraudulent representations, and from an order denying defendant's motion for a new trial.

Wm. G. Tracey, for appellant.

B. J. Shove, for respondent.

FINCH, J.—The defendant was convicted upon an indictment which charged him with having obtained a conveyance of land from one John Fay by false pretenses, which consisted in inducing him to accept, as part payment, a mortgage for \$2,000 upon 100 acres of land in Ulster county, which the prisoner falsely described in many material respects, and which were in fact of very trifling value.

The party defrauded was a witness for the prosecution, and on cross-examination was asked a series of questions, the purpose of which was to extract from him an admission that before the bargain was closed he had been advised by his counsel not to accept the mortgage without an examination of the land. If he made the admission, it would bear upon the question of his own possible negligence, and, if he denied it, there would be left the opportunity for contradiction. The evidence was rejected, and the general term, conceding that this was error, answer it by saying that the excluded fact was afterwards fully proved. On cross-examination of Mr. Ames, who was Fay's counsel in the transaction, he testified distinctly and fully to the fact of having given him such advice; and at the close of the case for the prosecution the prisoner's counsel rested upon

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the undisputed fact thus established as one ground of his motion for the discharge of the prisoner. During the further progress of the trial the same thing was again proved by a partner of Ames, and by a clerk in their office. But, at least, the fact was in part disputed, and it is that circumstance which the learned counsel for the appellant contends defeats the force and correctness of the argument that no injury resulted from the original rejection of the evidence. The dispute, however, arose in this way: The prosecution recalled Fay, and put to him the substantial question which had before been held improper. This time the defendant had the opportunity to secure an answer from the witness to the very inquiry which he had made in vain. If he wanted an answer, he could have had it, but he objected, and strove to prevent an answer being given. He partially succeeded, and by reason of his objection the question was narrowed to the inquiry as to the advice given by Ames in a particular conversation, and, in reply, the witness denied that it occurred before the consummation of the bargain. The defendant thus stands before us complaining that a question was not answered which was answered in part, and, so far as not answered, was left in that situation by his own objection. The two purposes originally sought were reached. The prosecutor was made to answer whether he received the advice claimed before the bargain was closed, and his denial exposed him to the contradiction as fully brought out as under any circumstances was possible. It is quite clear that no harm resulted from the original error, and that it became entirely immaterial.

It was in a part a theory of the defense that Fay's contract of sales was not with the prisoner, but with one McKinstry, to whom the deed was in fact given; that the mortgage was taken in reliance upon his promise to cash it within a short period, and that the fraud, if there was one, was perpetrated solely by him. As bearing on that theory, the prisoner offered to show, by the cross-examination of Fay,

that when the fraud was discovered, he settled with McKinstry, and got from him \$1,000 in discharge of his liability. This evidence did not at all tend to show that the defendant did not make the false representations charged and that Fay did not rely upon them; and was for that reason rejected upon Fay's cross-examination. The subject came up apparently by proof given on behalf of the prosecution, and on the direct examination of Fay, that he had not settled with McKinstry, nor had anybody for him. The cross-examiner, immediately taking up the subject, asked this question: "What was there about the transaction, if anything?" The court at first thought that in one view it might be competent, and asked counsel to state the purpose for which it was offered. The counsel replied that "it was with a view of shaking the testimony of the witness;" and then explained that he wanted to show by the witness that such a settlement had been made, and that the trade was with McKinstry. But the witness had just denied the settlement, and a mere repetition of that denial was of no possible moment. If the counsel had stated that something did occur between Fay and McKinstry which he wanted to put before the jury, and had explained what it was so that the court could have seen whether it tended to a contradiction, there would have been a basis for the objection, though even then the difficulty would have remained that the disputed fact was immaterial. It turned out, however, that McKinstry was called by the prosecution, and on cross-examination related, at defendant's request, the whole transaction with Fay. The witness said that he took the deed from Fay as security for \$500 of purchase money advanced by him for Clark, and \$500 more loaned to him. that he sold the Fay property, and, when the swindle was discovered, restored to Fay the balance of the proceeds received, after deducting the \$1,000 advanced to Clark, and the interest thereon. The transaction was thus disclosed,

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and whether it amounted to a settlement, and so contradicted Fay, was a question which the defendant's counsel was at liberty to argue. Whether material or not, the facts sought were furnished, and the defendant had the full benefit of all possible inferences to which they led. We do not think there was error in the ruling, but if there was it was fully cured.

No error was committed in accepting the juror Fairbanks as impartial and competent; in directing the prisoner to be tried separately from the others indicted with him; nor in refusing to restrict and narrow the cross-examination of the defendant.

Although the juror had an impression as to the guilt or innocence of the prisoner, he testified that he would be governed by the evidence, and his previous impression would not influence his verdict. He added his belief that he could render an impartial verdict according to the evidence; and on further examination he said he would give the prisoner the benefit of every reasonable doubt, and acquit him if such doubt existed. The juror was competent within the established rule.

The right of the prosecution to try the prisoner separately is fixed by statute. Code Crim. Pro., § 462.

While the cross-examination of the prisoner was protracted and severe, we do not discover that the limitations of the law were exceeded by asking if he had been accused or charged with anything criminal or disgraceful. The general history and mode of life of the witness threw light upon his character and his degree of intelligence and business experience: while his other dealings with the Ulster county tract bore strongly upon his attempted explanation, and were important facts in judging of its truth. How far such an examination may be carried is necessarily very much in the discretion of the court, and we do not think that such discretion was unwisely exercised.

Several other objections have been examined, but do not strike us as needing discussion.

The judgment should be affirmed.

All concur, except RUGER, C. J., not sitting, and MILLER, J., absent.

THE THIRD NATIONAL BANK OF BUFFALO, Appellant, v.
LUCIEN T. CORNES *et al.*, Respondents.

Court of Appeals, June 25, 1886.

1. *Question of fact.*—Where the question is one solely of fact, is decided by the referee in favor of the defendant, and reviewed by the general term with the same result, that conclusion, if entirely possible and reasonable upon some views of the evidence, must prevail.
2. *Issue. Not raised by pleadings.*—The defendant is not called upon to meet and answer a cause of action, not only absent from the pleadings, but entirely inconsistent with their allegations.

Appeal from a judgment of the general term of the supreme court, affirming a judgment for the defendants.

Adelbert Moot, for appellant.

F. R. Perkins, for respondents.

PER CURIAM.—The question in this case was solely one of fact. Whether the conveyance assailed was made with intent to hinder, delay and defraud the creditors of the grantor, or was made without such intent and in good faith, depended upon the circumstances surrounding the transaction, the credit to be given to the witnesses, and the inferences proper to be drawn. The question of fact decided in favor of the defendant by the referee was reviewed by the general term with the same result, and that conclusion, entirely possible and reasonable upon some views of the evidence,

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must prevail. We discover no question of law in the case unless it be over the contention that the conveyance may be deemed in trust for the benefit of the grantor beyond the cost of his support, and, as to the overplus, open to the assault of creditors. No such issue was raised by the pleadings or in any manner tried; but, on the contrary, the theory of the complaint was that the deed was fraudulent and void instead of being valid and good. The defendant was not called upon to meet and answer a cause of action not only absent from the pleadings, but entirely inconsistent with their allegations.

The judgment must be affirmed, with costs.

All concur.

DAVID S. PAIGE, Respondent, v. EDMUND WARING, Executor, etc., Appellant.

Court of Appeals, October 5, 1886.

Affirming 36 Hun, 643, Mem.

Adverse possession.—In an action to recover certain awards made to “unknown owners” for the taking of certain land in the city of New York, where plaintiff bases his claim to the awards on adverse possession, it is incumbent upon him to prove that the land was “usually cultivated or improved,” or that it was “protected by a substantial inclosure; and, where the appellate court is satisfied that there is some evidence from which the jury can find that both of the conditions mentioned were met during a period of more than twenty years preceding the date of the awards, it will affirm a judgment founded on plaintiff’s claim of adverse possession.

Appeal from a judgment of the general term of the supreme court, affirming a judgment in favor of the plaintiff.

H. H. Anderson, for appellants.

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John E. Burrill, for respondent.

EARL, J.—This case has been here once before, (76 N. Y. 463), and the most important legal questions involved were then settled. The action was brought to recover certain awards made to “unknown owners” for the taking of certain lands in the city of New York for the opening of Madison avenue, which awards were paid by the city to defendants’ testator, upon his claim to be the owner of the land. Both parties claim the land taken, by title derived from Peter Poillon. His conveyance of the land in the chain of plaintiff’s title was made June 21, 1827, and, if that conveyance had been at once recorded, there is no dispute but that plaintiff’s title to the land and the awards would have been perfect. But the infirmity in his title arises from the fact that that conveyance was not recorded until August 15, 1867. Poillon’s conveyance of the land in Waring’s chain of title was dated January 29, 1861, and recorded the next day; so that the defendants have the best record title, and, if there were nothing more, their title to the money awarded for the land, and paid to their testator, would have been perfect.

There is no evidence that any of the persons under whom the defendants claim were ever in the possession of the land, or ever exercised any acts of ownership over the same. But the plaintiff claims that his grantor was in the actual, open, notorious possession of the land, by his tenant, in January, 1861; and hence that, without the rule laid down in *Brown v. Volkening* (64 N. Y. 76), and other cases, there was constructive notice to Poillon’s grantee, at that time, of the prior unrecorded deed, and of the rights acquired thereunder. He also claims that for more than twenty years before the land was taken by the city, and the awards made, he, and those under whom he claims, were in the actual possession of the land, claiming under the convey-

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ance from Poillon, and hence that his title to the award was perfect on that account.

The persons who knew most about the facts relating to the possession were, at the trial of this action, dead, and hence the evidence as to such possession was not as certain and definite as could be desired. But it was submitted to the jury under instructions as to the law which we must, in the absence of the charge or any exceptions thereto, assume to have been proper and satisfactory, and their verdict in favor of the plaintiff must be regarded as conclusive, so far as there was any evidence upon which it could be based.

To make out the adverse possession in this case, it was incumbent upon the plaintiff to prove that the land was "usually cultivated or improved," or that it was "protected by a substantial inclosure." 2 R. S. 294; Code Pro., § 83; Code Civil Pro., § 370. Here, without going particularly into the evidence, we are satisfied that there was some evidence from which the jury could find that both of the conditions mentioned was satisfied during a period of more than twenty years preceding the date of the awards, and that plaintiff's claim of adverse possession was therefore well founded.

Without, therefore, determining whether, at the date of the second deed of Poillon, to-wit, January, 29, 1861, plaintiff's grantor was in the open, notorious, and actual possession of the land, within the meaning of the case of *Brown v. Volkening*, and other cases cited, we are of opinion that, for the reasons stated, the judgment should be affirmed, with costs.

All concur, except MILLER, J., absent.

FREDERICK McLEWEE, Respondent, v. BOLTON HALL *et al.*, Appellants.

Court of Appeals, October 5, 1886.

1. *Partnership. Liability.*—In order to hold defendants as partners with a corporation to which goods had been sold, where they were not such inter sese, it is necessary for the plaintiff to show that defendants held themselves out as copartners with the corporation and that the corporation obtained credit on that account.
2. *Same.*—The court of appeals has decided, in *Cassidy v. Hall*, 97 N. Y. 159, that the written agreement between the defendants and the corporation which forms the basis of this action does not make them copartners, or liable as such; and in this case holds that upon the question of partnership no substantial ground of difference exists between that and the present case.
3. *Same. Pleadings.*—Where the complaint sets up a cause of action against the defendants either as copartners inter sese, or as holding themselves out as such, the admission in evidence of a promise, original or collateral, by the defendants to pay for the goods sold and delivered to the corporation, against their objection, is error, and, without an amendment of the complaint, proof of the defendants' liability, founded upon a basis other than that stated in the pleadings, cannot be given and acted upon to sustain the unpleaded cause of action.

Action brought by the plaintiff against Hall, Nicoll & Granbery, and the United States Reflector Company, claiming that said firm were copartners with said company, and as such jointly liable for the claim set up in the complaint.

The claim on the trial was sought to be sustained principally upon the following written agreement between the firm of Hall, Nicoll & Granbery and the United States Reflector Company.

“ This agreement, made and entered into in the city of New York, this 22d day of April, 1880, between Bolton Hall, Ben-

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jamin Nicoll and David W. Granbery, all of the city of New York, composing the firm of Hall, Nicoll & Granbery, parties of the first part, and the United States Reflector Company, a corporation organized and existing under and by virtue of the laws of the state of Connecticut, party of the second part, witnesseth ; that,

Whereas, said parties of the first part contemplate assuming the control of the said United States Reflector Company, when, if ever, they shall be satisfied that the business of said company is a profitable one and that it fully realizes their expectations ; and,

“ *Whereas*, it is expedient that some arrangements should be made, whereby the profitableness of said business may be determined by them, and the representations made by said company as to the character and volume of its business may be proven to the satisfaction of the said parties of the first part:

“ Now, therefore, in consideration of the premises and of the mutual promises, covenants and agreements each to and with the other made as hereinafter set forth, and of the sum of one dollar each to the other in hand paid, the parties to this agreement do covenant, promise and agree to and with each other in the way manner and form following, to wit :

First. The said parties of the first part shall furnish the money necessary to execute the orders of The United States Reflector Company for goods manufactured and to be manufactured by it, in accordance with the claims and specifications of any and all the letters patent to it belonging or otherwise, by making advances of money to said company on such of said orders as they, the said parties of the first part, shall approve of ; and when and so long as the said the United States Reflector Company shall be indebted to the said parties of the first part for money paid to it by their said firm in discounting the bills and notes of said company, received by it in the ordinary course of business, as set forth in section 5 of this agreement, then in that case it shall

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be obligatory upon said company, and the said company does hereby covenant, promise and agree to allow the said parties of the first part at their option to make such advances on each and every order that it may receive for its manufactured and to be manufactured goods and to submit each and every order to said firm for that purpose, and to pay for such advance as hereinafter set forth ; but when and so long as the said the United States Reflector Company shall be indebted to the said parties of the first part for money paid to it by said firm, in discounting the bills and notes of said company, as set forth in said section five of this agreement, then in that case it shall not be obligatory upon said company to allow said parties of the first part to make such advances ; but the said company may at its option apply to said firm for that purpose.

“ *Second.* The said the United States Reflector Company shall and will assign, transfer and set over to said Hall, Nicoll & Granbery, at the time any such advance is made, the bill or order upon which they, the said parties of the first part, shall make such an advance as herein above set forth, with full power to collect and sue for the same and to receipt therefor on collection.

“ *Third.* The said parties of the first part shall in all cases collect every bill or order so assigned to them as aforesaid, and upon which they have made an advance to said company as herein above stated ; and out of the money arising from the payment thereof the said parties of the first part shall retain the amount advanced by them thereon as herein above mentioned, together with six per cent interest thereon from the date of such advance, and in addition thereto the amount of twenty-five per cent of the face of every such bill or order where the profits to the said company on the cost of making up the bill or order is 100 per cent, and in the same proportion when the said profit is less ; but in no case the said parties of the first part shall receive less than ten per cent on the amount advanced by them in addition to the

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amount so advanced on any bill or order as hereinbefore mentioned.

"*Fourth.* If the said company shall have on hand materials sufficient to make up the whole or part of any order or orders, the said parties of the first part will advance to the said company on the said material, estimated according to its market value, money sufficient to execute said order or orders on the same terms, at the same rates and in the same method as stated in the first, second and third articles of this agreement.

"*Fifth.* The said parties of the first part shall and will discount all such notes, bills, checks, drafts and accounts belonging to said the United States Reflector Company and received by it in the ordinary and usual course of its business as they, the said parties of the first part, shall approve of, but not otherwise, at the rate of six per cent per annum.

"*Sixth.* The said the United States Reflector Company shall and will not, during the continuance of this agreement borrow money on their orders or order for the goods manufactured or to be manufactured by, under and in accordance with any letters patent to it belonging or otherwise, or allow its bills or notes to be discounted by any person or persons whomsoever other than the said parties of the first part.

"*Seventh.* This agreement shall be terminated at any time whatsoever, at the pleasure and option of the said parties of the first part, by a written notice to the company to that effect, served on its treasurer; and on the service of said notice, in the way and manner aforesaid, this agreement shall then cease and determine, and the parties of the first part hereto shall be absolutely and forever discharged and released from any obligation or liability hereby created, except that they, the said parties of the first part, shall have the right and they are hereby empowered to collect any bill or order upon which they have advanced, as provided in the first article of this agreement, and which may not have been collected by them at the time of the termination

of this agreement as hereby provided, and to receive and to retain out of the proceeds of said collection the amounts which, under the third article of this agreement they are entitled to.

“*Elighth.* Unless sooner terminated as hereinbefore provided, this agreement shall continue in full force and effect until the first day of February, 1881, and be binding on the parties hereto and their legal representatives and successors.”

Judgment was entered for plaintiff upon a verdict, and the defendants Hall, Nicoll & Granbery appealed to the general term of the court of common pleas, where the judgment was affirmed, from which the said defendants again appealed.

Williams & Scott, for appellants.

F. M. Littlefield, for respondent.

FINCH, J.—This action was brought against the defendants, as copartners, doing business as such under the name and style, as a firm; of the United States Reflector Company. Unless such a copartnership in fact existed, or was so represented to exist, as to involve liability to third persons dealing upon the faith of the representations, the cause of action pleaded was wholly unproved, and judgment should have gone for the appellants. The actual relation existing, by their mutual agreement, between the firm of Hall, Nicoll & Granbery and the corporation organized and known as the United States Reflector Company was proved upon the trial. That agreement was in writing, entirely undisputed, and there is no pretense that, as between the firm and the corporation, any other agreement establishing their relations *inter sese* was at any time made. We have already decided that the contract referred to did not make the firm and the corporation copartners, and liable as such. *Cassidy v. Hall*, 97 N. Y. 159. The plaintiff, therefore,

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under his pleadings could only recover upon the ground that, although not in fact partners, yet Hall, Nicoll & Granbery held themselves out as such, and the Reflector company obtained credit on that account. The fact relied upon were very nearly those which in *Cassidy v. Hall* we held to be insufficient. They do show a sale to the corporation upon the verbal guaranty of the firm, the former being principal debtor and the later surety, or the reverse, but they do not show, or tend to prove, a representation of an existing copartnership.

The plaintiffs examined George Bridge, who was in the employ of the corporation, and who applied to purchase for it the cross and gas fixtures sued for. Before attempting the purchase, the witness told Hall that no one would trust the Reflector company, to which Hall replied: "You must tell everybody the same as I have told you: we are the Reflector company." This indicated no partnership. It suggested something quite different. The inference which it justified was that the firm had become the owners of the corporation, and were sustaining its credit, but not that a copartnership had been formed. The witness further explained that he was authorized by Hall to say that the corporation was "now in good condition," and that "Hall, Nicoll & Granbery were its backers." These representations were made to plaintiff, but he declined to sell upon them. In some form, he evidently wanted the direct responsibility of the firm, and was unwilling to sell without it. Finally Bridge, by the authority of Hall, promised that the firm should pay the bill, and thereupon the sale was made. The goods were delivered to the Reflector company, charged to it, and the bill sent to it for payment. Many letters from Hall to Bridge were produced. They showed a continuous interference by the firm with the management of the business of the corporation, but an interference natural and proper under the written agree-

ment, which contemplated an effort to restore the company's prosperity and build up its business.

The plaintiff himself was called, and gave his version of the representations leading to the sale. These were that the Reflector company was backed and owned by Hall, Nicoll & Granbery, and was in good condition; that they controlled its business and furnished the money; and that, if he sold to it, he should have his pay. The effort was to bolster up its credit by an assurance of the firm's interest in it and determination to aid it; but there was not a word leading to any inference, or encouraging any belief, that the firm and the corporation had formed a copartnership which was to be the proposed purchaser. On cross-examination he shows that he perfectly understood the real relation existing, and was not misled by even the suggestion of a partnership. He says: "I asked Bridge what relation Hall, Nicoll & Granbery were to the Reflector company and where they were getting their money; and, Nicoll & Granbery, *if they became security for the cross.*" Bridge answered that they controlled the company, not that they were partners in it; that all orders were submitted to them; that bills were paid and collected by them; that they bought for the company, and reimbursed their advances from collections made by them. Other circumstances and incidents were shown, most, if not all, of which were considered by us in the Cassidy Case. Upon the question of partnership, we are unable to see any substantial ground of difference between that case and the present one.

But there is another and graver question involved, although not raised in the appellant's brief. The firm did promise to pay this debt as an inducement to the sale by the vendors. Whether that promise was original or collateral, and whether the firm may not have become principal debtors for the goods, is a very serious inquiry upon the evidence. Apparently, that is the question which the court submitted to the jury upon the facts, and although

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outside of the pleadings, it was covered by the proof. But to that proof an objection was interposed by the defendants. When the promise, "We will pay that bill," was first sworn to by Bridge, the defendant's counsel moved to strike it out upon the ground that the whole theory of the action was a partnership; that what Hall said tending to induce the belief was pertinent, but the promise sworn to "seems without the limits of the pleadings." The court admitted the evidence, "as against Hall," and the defendants excepted. The promise to pay, even if original, was thus admitted only as against Hall, and the ruling cannot stand as a basis of the firm's liability as purchasers and original debtors. The question of pleading was squarely raised, and thereafter, without an amendment of the complaint, proof of the firm's liability, founded upon a basis other than that stated in the pleadings, could not be given and acted upon to sustain the unpleaded cause of action. The admission of the evidence was error which can only be cured by deeming the promise to pay merely evidence bearing upon the question of partnership; and although quite singularly the court submitted this unpleaded cause of action to the jury, stating the inquiry to be whether "Hall meant himself to be the purchaser, together with the United States Reflector Company;" and adding that, if the jury so found, "the plaintiff would be entitled to a verdict because the goods were sold not only to the United States Reflector Company, but to Mr. Hall," and although this charge evoked no objection or exception from the defendant, yet we cannot ignore the fact that the evidence to sustain this unpleaded liability was objected to for that reason, and its erroneous admission, both as against the firm and as against Hall, cannot be resorted to even to save what may be a very just verdict. Possibly, on a new trial, the pleadings, may be so amended as to prevent the very serious question of the primary liability of the firm outside of a

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partnership, but, as the case stands, the judgment rendered was erroneous.

Judgment reversed ; a new trial granted ; costs to abide the event.

All concur, except MILLER, J., absent.

MARY MAGUIRE, as Administratrix, etc., Respondent,
v. GEORGE SELDEN, Appellant.

Court of Appeals, October 5, 1886.

Affirming 34 Hun, 681, Mem.

Estoppel.—Statements made to a third person, and not to the defendant, nor to be communicated to him, nor intended to influence his conduct, however understood, cannot be extended beyond the party to the transaction in relation to which they were made, nor operate as an estoppel in favor of the defendant.

Action brought to foreclose a mortgage.

Appeal from the general term of the supreme court, affirming a judgment of the special term in favor of the plaintiff.

Estes & Barnard, for appellant.

Charles J. Patterson, for respondent.

DANFORTH, J.—The execution and validity of the bond and mortgage were admitted, and the first question upon the trial was, whether the sum secured by it had been paid. That was determined against the defendant by the trial judge, and his decision is not now controverted. It appeared, however, that the defendant, with intent to have it applied upon the mortgage, delivered money sufficient to make the payment to one Evans, under the belief that he was agent for the plaintiff and authorized to receive it ; and the prin-

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incipal point now made is, that the evidence required the judge to find from the words and conduct of the plaintiff, that she induced the belief on which the defendant acted, and so was estopped from denying that the payment to Evans was as to the defendant sufficient to discharge the debt. This, too, was a question of fact to be determined by the trial judge, and upon it he found against the defendant.

The general term were of opinion that his conclusion was justified by the case made, and we think the testimony permits no other result. The mortgage was executed in May, 1875, to mature on the 30th of August, 1876, with interest, payable semi-annually; the plaintiff as administratrix, became its owner in July, 1876, the defendant resided in Pennsylvania, and before October 28, 1881, bought the premises of one Lyons, subject to the mortgage; Mykoff brothers were the agents of Lyons, in the fall of 1881, and at his request one of that firm called upon Mrs. Maguire to see if she wanted the principal. "She said she didn't want the principal, she wanted the interest." "I asked her," he says, "if she held the mortgage; she said she did; then I asked her again about the principal, and she replied she didn't know much about that, also that she didn't know much about the papers, as Mr. Evans had charge of them."

Asked by defendants' counsel: "When you asked her whether she wanted the principal or not did she say anything about seeing Evans then, or whether she had got to see him? He said, "Yes, sir; I stated that she said Evans had charge of matters in regard to receiving and collecting interest always. In the former part of my statement, I said that she said she didn't want the principal, she wanted the interest. I remember that she said she would have to see Evans about it."

Lyons testified, in substance, that while his wife owned the property, he had a general conversation with the plaintiff, in which she said Evans was her agent, and had her papers and would act for her. These alleged conversations are denied by Mrs. Maguire.

It is quite immaterial to inquire who of these witnesses should be credited.

The trial judge has found that Evans was not in fact the agent of the plaintiff for the purpose of receiving the principal of the mortgage; that he did not have the bond and mortgage, and that the defendants were not misled to the contrary, by anything the plaintiff said or did. But however the plaintiff's statements, as testified to by the defendants' witnesses, are interpreted, they cannot help his case. They were not made to the defendant, nor were they made to be communicated to him. It so happened that Mykoff afterward was employed by the defendants. That was an accidental circumstance, not anticipated by the plaintiff, and not sufficient to give the character of an estoppel to her statements, in favor of the defendants. They were not intended to influence his conduct, and however understood, could not be extended beyond the party to the transaction in relation to which they were made. *Mayenborg v. Haynes*, 50 N. Y. 675. They were competent as evidence, but could have no greater effect. Some exceptions have been argued, but they seem to us without merit.

The judgment should be affirmed.

All concur, except MILLER, J., absent.

THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ROXALANA DRUSE, Appellant.

Court of Appeals, October 26, 1886.

Affirming 41 Hun, 640, Mem.

Murder. Examination of witness.—The trial court, upon a criminal trial, may, in its discretion, after a witness has detailed the incidents of the transaction without interruption, permit the district attorney to call his attention to the particular facts, in case it carefully guards and protects the legal rights of the defendant in the examination.

2. **Same. Evidence.**—On the trial of an indictment for murder, the defendant, in support of his claim that the homicide was committed in self-defense, can not be permitted to show that the deceased treated his domestic animals with cruelty. He may, after giving evidence tending to prove self-defense, follow it by proof of the general reputation of the deceased for quarrelsomeness and violence; but he is confined to proof of general reputation, and evidence of specific acts of violence toward third persons is inadmissible.
3. **Same. Confession.**—The confession of a defendant, not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution, is voluntary though made when under arrest, and is admissible against him on a criminal trial, within the general rule prescribed by section 395, of the Code of Criminal Procedure.
4. **Same. Evidence.**—Evidence to show that the deceased robbed his father, when in his coffin, of his grave clothes, and wore them at his funeral, is wholly irrelevant and immaterial, on the trial of an indictment for murder.
5. **Practice. Review.**—Where the general term has affirmed a conviction of murder, the only questions cognizable in the court of appeals are those arising upon exceptions taken in the course of the proceedings.

Action in which the defendant herein was indicted and convicted of the crime of murder in the first degree.

Appeal from a judgment of the general term of the

supreme court, affirming a conviction, at the oyer and terminer, of the crime of murder.

H. D. Luce, for appellant.

Eugene E. Sheldon, for respondents.

ANDREWS, J.—The defendant was convicted at the oyer and terminer in Herkimer county, on the 6th day of October, 1885, of the murder of her husband, William Druse, in the town of Warren, in that county, on the 18th day of December, 1884. The general term has affirmed the conviction, and the only questions cognizable in this court are those arising upon exceptions taken in the course of the proceedings. *People v. Boas*, 92 N. Y. 560; *People v. Guidici*, 100 id. 503.

It is not disputed that the deceased came to his death by the act of the defendant. The only defense attempted to be made on the trial was justifiable homicide. The history of the transactions at the house of Druse on the day of the homicide, as narrated by the witnesses on the part of the people, discloses one of the most remarkable tragedies to be found in the annals of crime. The deceased was a farmer, and lived with his wife and their two children—Mary, of the age of about nineteen years, and George, of the age of about ten years—on a small farm in the town of Warren. Frank Gates, a nephew of the defendant, about fourteen years of age, was also, at the time of the homicide, a member of the family. The husband and wife had frequent altercations, and their relations for several years prior to the homicide had been very unpleasant. He was a shiftless farmer, a poor provider, often abusive to his family, and the contracting by the wife of small debts at the stores for clothing and supplies for herself and her children was the occasion of frequent quarrels between them.

The homicide occurred on the morning of the eighteenth of December, in the kitchen of the house. The sole evi-

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dence of eye-witnesses of the transaction is that of Frank Gates, and George Druse, and his sister Mary. The two boys were sworn on the part of the people, and Mary Druse, upon whose testimony alone the defense of justifiable homicide was sought to be supported, was sworn in behalf of the defendant.

The testimony of the two boys who differ as to some of the details, but who agree in the main facts, may be briefly stated. It appears from their story that the deceased, after having done his chores, came in to his breakfast, and sat down at the table in the kitchen, with his back to the stove. The defendant and the two boys and Mary Druse were in the room, but were not at the table. The deceased commenced finding fault with the tea, addresssing his wife in harsh and profane language, and complaining of the store bill. The defendant went into the buttery or parlor, and came out with a revolver, which she held under her apron. She then spoke to the boys in a low tone, and told them to go out doors. They went out, and George testified that he heard two or three shots. Frank Gates heard a noise as of chairs being tipped over, but heard no shots. The defendant then called Frank Gates into the house. He came in, and found Druse sitting in his chair, with a rope around his neck; and the defendant required Frank to take the pistol, and fire at Druse, using at the same time threatening language. He took the pistol, and fired as directed, and after that the defendant took the pistol and fired again at her husband. He fell or was thrown from the chair, and the defendant then took an axe and hit him on the head; and he said, "Oh Roxy, don't!" She then severed the head from the body, and rolled it up in a newspaper or a skirt, and carried it into the parlor. She then directed the boys to go upstairs and bring down a straw tick, which they did, and, placing the body upon that, it was dragged into the parlor. She then sent the boys down to a brush lot to get a sharp axe, which they brought. She had newspapers placed over the

kitchen windows, and set Frank Gates and her daughter, Mary, to watch them. She afterwards sent the boys out after wood. They brought in dry shingles in a clothes basket and they were taken into the parlor. She then sent Frank Gates to a neighbor's for matches. The day was apparently spent by the defendant, assisted by her daughter, in cutting to pieces and burning the body of her husband, while in the afternoon the boys amused themselves by playing checkers. The next day the refuse in the stoves, containing the unconsumed portions of the body, was collected and put into a box, which was placed in a cutter and taken by the defendant, Mary, Frank and George, and dumped among some bushes in a swamp. Subsequently Frank Gates, by her direction, threw the axe and revolver into a pond, where they were found after the arrest of the parties. The defendant represented to neighbors that her husband had gone to New York, and, to divert suspicion, she telegraphed to a friend, asking, "Is William there?"

The testimony of Mary Druse, who was jointly indicted with her mother for the murder, was introduced to show that her father at the time of the homicide had attacked her mother with a knife, under circumstances which justified the killing. It is sufficient to say that her narration was very improbable, and was inconsistent with some of the conceded facts, and that the jury disbelieved her. The testimony of the two boys was confirmed, as to the main facts, by the confession of the defendant to the witness McDonald.

It will be seen from this *résumé* of the principal facts that there was abundant evidence to justify the conviction. The evidence on the part of the people supplied all the elements necessary to the crime of murder in the first degree. The general term, in a careful opinion, has examined the case upon the facts and the law, and reached the conclusion that no error was committed on the trial, in which we fully concur.

We shall content ourselves with a reference to a few of

the exceptions, although all of these seem to be unsubstantial, and none of the questions raise any doubt as to the correctness of the rulings.

First. The court, in its discretion, properly permitted the district attorney to call the attention of the witnesses Frank Gates and George Druse to particular facts, after they, without interruption, had gone through the story of the incidents of the eighteenth of December. We think the judge carefully guarded and protected the legal rights of the defendant in their examination.

Second. The court properly excluded the defendant's offer to show, by the witness Van Evera, that the deceased treated his domestic animals with cruelty. The rule is that after evidence has been given by a defendant tending to show that the homicide was committed in self-defense, he may follow it by proof of the general reputation of the deceased for quarrelsomeness and violence. But a defendant is confined to proof of general reputation, and evidence of specific acts of violence towards third persons is admissible. *People v. Lamb*, 2 Keyes, 371; *Eggler v. People*, 56 N. Y. 643; *Thomas v. People*, 67 id. 218. This principle plainly excludes the evidence offered.

Third. The confession of the defendant to the witness McDonald was properly admitted. It was not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution, and was therefore admissible, within the general rule prescribed by section 395 of the Code of Criminal Procedure. It is immaterial that when made the defendant was under arrest. The confession was voluntary, and was not within the rule recently applied in the Case of Mondon, excluding confessions made by an accused prisoner, as a witness, who has not been informed of his legal rights.

Fourth. The court properly excluded evidence to show that the deceased robbed his father, when in his coffin, of

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his grave clothes, and wore them at his funeral. It was wholly irrelevant and immaterial.

We leave the other exceptions without special notice. Most of them are considered in the opinion below, and are satisfactorily answered. There was no exception to the charge. It fully stated the facts and the law applicable to the case.

We see no reason for disturbing the judgment. It should therefore be affirmed.

All concur.

JAMES B. LOCKWOOD, as Sole Testamentary Trustee, etc.,
et al., Appellants, v. WILLIAM T. BRANTLY, Adminis-
trator, etc., *et al.*, Respondents.

Court of Appeals, November 23, 1886.

Affirming same case, 38 Hun, 642, Mem.

Trustee. Title by acquiescence.—The transfer of shares of capital stock of a corporation by a trustee, and claim of ownership by the assignee for a number of years, known to all the beneficiaries at the time of such transfer and since, together with the lapse of time, negligence in asserting the right and acquiescence in the assignee's claim unexplained, afford conclusive proof of the acquisition of a good title by the assignee, and sufficient to defeat an action to compel a transfer of such stock by the assignee's administrator to the trustee.

Henry Cooper, for appellants.

Howard R. Bayne, for respondents.

DANFORTH, J.—This action was commenced May 12, 1883. It appears from the record that Benjamin F. Cooper died at the city of Utica on the 6th of May, 1864, after devising all

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his property in trust, first, for the support and benefit of Mary A., his wife, and Helen, his daughter, and if there should be any surplus, then, second, for the support of his sons William and Henry. The persons named as trustees and his son William B. were appointed executors, but Graham and William B. alone qualified as such. The will was admitted to probate in June, 1864, and the above named executors and Graham as trustee continued to act in their several capacities until December 20, 1880, when upon proceedings instituted in the supreme court by Graham, Mary A., Helen, William B., and Henry Cooper, an order was made discharging Graham from his office of executor and trustee, and from that time Brantly continued sole executor until his death in 1882, when James B. Lockwood was appointed in his place.

At the commencement of this suit therefore, William B. Cooper was the sole executor of the will of Benjamin, and Lockwood sole testamentary trustee. William B. Cooper refused to join as plaintiff, either as an individual or as executor, and was therefore made co-defendant, in both capacities, with William T. Brantly, who was sued as the administrator of the Brantly before mentioned. The plaintiffs are Lockwood, who sues as trustee of the estate of Benjamin F. Cooper, and Mary A. Cooper, Helen Cooper and Henry Cooper, beneficiaries under his will.

The object of the action is to compel the defendant Brantly to transfer to the defendant William, as executor, or to the plaintiff Lockwood as trustee, certain shares of the capital stock of the Utica Cotton Mills, and \$1,600.27 with interest, being the amount of dividends paid thereon since the 1st day of August, 1871. The defendant Brantly alone answered, denying certain material allegations of the complaint and setting up several affirmative defenses. At special term the issues were decided in favor of the defendant and the complaint dismissed.

Upon appeal by the plaintiffs the general term affirmed

that decision, and against the judgment then rendered, they appealed to this court. The present controversy brings in question the title to the stock above referred to. It is undisputed that six shares were owned by the testator; that on the 15th day of May, 1861, he duly transferred those shares to William T. Brantly, the respondent's intestate, as collateral security for a loan of \$500 theretofore made to him, and at that time with the interest thereon unpaid and due. For a time Cooper, under a power of attorney from Brantly, collected the dividends and applied them to his own use. Afterward Brantly assigned the stock to "William B. Cooper, trustee," and on the third of February, 1864, they were so transferred on the books of the company and a new certificate issued to the assignee. He collected the dividends until February 1, 1865, and after that, until August, 1866, they were collected by Graham and paid over by Brantly's direction to Mrs. Cooper and Helen Cooper. It is also found, by the learned trial court upon evidence before him, that upon the 7th of July, 1866, Cooper, as trustee, for value received, transferred the stock to Brantly, who thereafter, until his death in March, 1882, held, claimed and treated the stock as absolutely his own and received the dividends thereon.

The plaintiffs' contention is in substance that notwithstanding this new and absolute assignment, Brantly afterward held the stock either as he had first received it, as collateral security, or the dividends having amounted to the sum for payment of which it was pledged, as depository, without a lien upon or interest of any kind in it; in either event as trustee. It certainly does not appear upon what actual consideration the final transfer to Brantly was made, but the fact of transfer and the claim of ownership were known to every one of the parties interested, long before the death of Mr. Brantly, and to William B. Cooper and Graham at the very time of the transfer, for both were actors in the transaction. They were trustees and executors, they

knew of the terms of the original assignment by way of pledge or collateral security, and of the subsequent absolute conveyance. So did Henry Cooper, one of the beneficiaries under the will, and Mary E. and Helen Cooper, whose meagre support was derived from an estate insufficient for the purpose, and was eked out by the frequent benevolence of Brantly, avowedly founded upon his possession and ownership of the stock in question. Not one of the persons disputed the title of Brantly, and although in 1880, Graham, on their petition, was relieved of his trust, no claim was made by either that the stock formed part of the estate of B. F. Cooper, with the management of which he had been charged. Not then, nor till after the death of Brantly did this contention arise. Had it been otherwise it may be presumed some fuller explanation might have been had from him. If it be now scant the plaintiffs cannot complain. On the part of Brantly there was no concealment; on the part of every one interested there was perfect acquiescence.

From these facts it would seem to follow that, at the time of Lockwood's appointment as testamentary trustee, the estate intrusted to him was in no way concerned or interested in the stock in question. The defendant's intestate had acquired a good legal title to it, and we agree with both courts, whose judgments are before us, that there is in evidence nothing which would justify any tribunal in depriving his estate of its benefit. Indeed, there is no reason to believe that this action would have been brought except for the death of Brantly, and that circumstance should not relieve the plaintiffs from giving the fullest measure of proof, and repelling by evidence the presumption which, after a lapse of more than twenty years, requires us to hold that the apparent title was the real title. Here is not only lapse of time and negligence in asserting the contrary, but acquiescence,—three objections to the plaintiffs' claim which, upon the testimony, are wholly unexplained, except upon

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the theory that, so long as Brantly lived, all parties interested recognized his title as unassailable. There would be great danger of an unjust advantage if, he being dead, the same parties should now be allowed to question it. It is difficult to find good faith in the plaintiffs' claim. There has certainly been no diligence in asserting it. We think there is no equity in the suit, and that the complaint was properly dismissed.

The judgment appealed from should be affirmed with costs.

All concur.

MARY SHAW, as Administratrix, etc., Respondent, v.
CHARLES L. SHELDON et al., appellants.

Court of Appeals, November 23, 1886.

Reversing same case, 37 Hun, 639, Mem.

1. *Negligence. Master and servant.*—A foreman of the rollers in a rolling mill, who is a skilled workman, accustomed to the machinery and the service, and has the capacity and ability fully to appreciate the consequences of leaving the couplings uncovered, where the fact is entirely obvious and the resultant peril plain at a glance, assumes the risk of injury from the observed and obvious omission.
2. *Same.*—The fact that the superintendent asked the deceased if he wanted the couplings covered, and that the latter declined the precaution, conclusively proved that the servant took upon himself the risks of the omission and freed the employer from responsibility.

Action to recover damages for negligently causing the death of plaintiff's intestate, who was an employee in defendant's rolling mills.

Appeal from a judgment of the general term of the supreme court, affirming judgment entered upon a verdict.

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The opinion of the general term states the facts as follows:

"The defendants carried on a rolling mill at Auburn, and the deceased was employed by them as a 'roller.' In the process of the defendants' manufacture, heated bars of iron were pressed between heavy rollers of corrugated iron. To prevent the rollers from becoming injuriously heated by the process they were supplied with water which was conveyed in a trough suspended above the rollers. When revolving, the rollers were dangerous in case any of the employees came in contact with them. There is testimony tending to show that it was usual in most rolling mills to cover the couplings of the rollers with wood or metal. It also appeared that when deceased first entered defendants' employ, a wooden cover had been provided for the couplings, which was afterwards destroyed, and for some time before his death the couplings remained uncovered, with the exception of a partial protection consisting of an iron tub or 'bosh' placed in front of the coupling, which, however, did not serve the purpose of a complete covering.

"On the night of May 18, 1883, while deceased was at work on the finishing rolls he was told by one of his co-employees that the water was not running from the trough to the rollers. The trough was higher than Shaw's head, and he stepped upon the iron 'bosh' and was seen to look into the trough. While so standing his foot slipped, or his clothing was caught by the suction of the revolving couplings and he came in contact with the rollers and received injuries of which he died eleven days thereafter.

"It was a common thing for the flow of water from the trough to be interrupted and for one or the other of the employees to step upon a bosh to look into the trough for the cause of the stoppage. This occurred on an average several times a day. On such occasions the rolls were not stopped. Owing to the frequency with which the men in the mill had stepped upon the bosh for the purpose of looking into the trough, the top of the bosh had been worn smooth

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by their hobnailed shoes. Shaw might have looked into the trough by passing around the machinery, going to the rear of the rolls and stepping upon a plate which projected from the machine."

"The duty of examining the troughs was not imposed upon any particular person. Any of the employees who happened to be in a situation to look, or who was not otherwise employed, considered it his duty to examine whenever the flow of water stopped."

The trial judge charged the jury, among other things, as follows:

"I say to you further that Mr. Thompson testifies that some time before this accident, a few weeks after Mr. Thompson assumed the superintendency of this mill, he asked Mr. Shaw if he did not want the boards put up there as guards, and that Shaw told him he did not want them, that Rush had them but they were in the way, and they had been broken and thrown away and he did not want them. It is true that this conversation is related by Mr. Thompson as occurring when nobody was present except himself and the deceased. The question is whether or not you believe that testimony. Mr. Thompson appears to be a fair minded man for aught that appears upon this trial. If Thompson did ask him if he did not want the boards put up there, and Shaw declined to have them put up, it is a circumstance, gentlemen, that you must take into account in determining the question whether or not Shaw himself was not guilty of some act or omission for his own safety which materially contributed to this injury.

"These questions, gentlemen, must be decided by you in favor of the plaintiff before she can recover. I express no opinion upon either of them. If you shall find them both in her favor, namely: that the accident occurred solely through the negligence of the defendants and that Shaw himself was guilty of no carelessness which contributed to the injury, then you will come to the subject of damages,

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which I stated to you in the outset of my charge to you. Your verdict should be either for the plaintiff, giving the amount which you shall say from the evidence the life of Shaw was fairly worth to the next of kin, or it should be a general verdict for the defendants.

"The defendants thereupon excepted to that part of the charge in which the court left it to the jury to determine whether, when Shaw entered upon defendants' employment the last time, when he was employed before the accident, he accepted the risks occasioned by the known absence of the boards in front of the couplings or rolls.

"The jury rendered a verdict for the plaintiff for \$2,500, and thereupon the judge presiding at the trial, upon the application of defendants, did direct an order to be entered that the exceptions taken by defendants on said trial be heard at the first instance at the general term and that judgment be suspended in the meantime; and such order was thereupon duly made and entered."

Richard C. Steele, for appellant.

Louis Marshall, for respondent.

PER CURIAM.—The majority of the court are of opinion that this judgment should be reversed, for the reason that the facts established beyond dispute that the injured employee entered the service and remained in it with a full knowledge and appreciation of the risk and danger resulting from leaving the couplings uncovered. The fact was entirely obvious, the resultant peril plain at a glance, and the injured servant a skilled workman, a foreman of the rollers, accustomed to the machinery and the service, and having the capacity and ability to fully appreciate the consequences of leaving the couplings uncovered. Within the rule applicable to such cases the plaintiff's intestate took upon himself the risk of injury from the observed and obvious omission.

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The court are also of opinion that the trial judge erred in charging the jury that if they believed the evidence of the superintendent that he asked the deceased if he wanted the couplings covered, and the latter declined the precaution, it was a circumstance for them to consider upon the question of the assumption of consequent dangers by the deceased.

If the fact sworn to was true, it conclusively proved that the servant took upon himself the risks of the omission and freed the employer from responsibility. The jury should have been so charged. The principal doubt among us on this branch of the case has been whether the defendants' exception was sufficient to bring up the question.

The judgment should be reversed and a new trial granted; costs to abide the event.

All concur, except RUGER, Ch. J. ; DANFORTH and FINCH, JJ., dissenting.

JENNIE E. GARDINIER, Administratrix, etc., Respondent, v.
THE NEW YORK CENTRAL AND HUDSON RIVER RAIL-
ROAD COMPANY, Appellant.

Court of Appeals, November 23, 1886.

Reversing same case, 36 Hun, 647, Mem.

1. *Negligence. Highway crossing.*—Though a railway falls in its duty to restore the highway, across which its tracks is constructed, to such a state as not unnecessarily to have impaired its usefulness, or to make the passage to its bridge safe for the public, it is not liable, unless the injured party is shown to have been affected by its negligence, or his injuries are caused by some default on its part. The proof, and not the mere surmise of the jury, must establish that he was at the wing wall going towards, or was on, the bridge when the accident occurred, otherwise the condition of the bridge over the highway becomes unimportant.

Action to recover damages for negligence causing the death of plaintiff's intestate.

Statement of the Case.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered on a verdict.

The complaint, among other things, alleged "That at the village of Fonda, in the county of Montgomery, at a point where the public highway, leading from Fultonville to Fonda, and between the Mohawk river and the Mohawk turnpike, crosses the railway track of defendant, is a bridge, erected and maintained by defendant, for the purpose of, and for the use of the traveling public, crossing defendant's railway track over the same upon said highway, and which said bridge it was the duty of the defendant to keep, maintain and have, for the use of the public to travel, in a safe and proper condition, properly protected and guarded, for the safe passage of all persons desiring to cross the same; that the span of said bridge, crossing over said railway track, rests at either end thereof upon stone abutments raised from the level of said railway track, nearly perpendicular or vertical, to a height sufficient to admit of the engines of defendant to pass under said bridge, at least from ten to twenty feet high; that the width of said span of said bridge is less than the full width of said highway, so that in the approach to said bridge, upon said highway, on either side thereof, where said highway meets the floor of said bridge, there is a space of several feet between the corner of the bridge and the side of said highway, and a wing wall, nearly perpendicular, extending either way from the floor of said bridge; that at the northwest corner of said bridge, at the time hereinafter stated, the defendant carelessly and negligently left said wing wall, for several feet where the said highway approached said bridge, without any proper or sufficient guard fence or railing to prevent persons approaching said bridge from falling over said wall, and down towards and upon said railroad track, and left the same, and carelessly and negligently permitted the same to remain in an unsafe, unguarded and dangerous condition."

The complaint further stated, "upon information and be-

lief, that the plaintiff's intestate, John H. Gardinier, deceased, in his lifetime and on the 17th day of December, in the year 1881, in the evening of the said day, was at Fonda, in said county, and started to go from said village of Fonda, by the way of said highway and bridge, to Fultonville, where he resided, and in attempting to approach and cross said bridge, in the night time, did, without any want of care and without any fault or negligence on his part, accidentally walk over and fall over said wall of said bridge, down to and upon the stone, iron and earth below, whereby he was injured, in his person, insomuch that from said injury he died, and his death was caused solely by the injuries received in said fall; and said fall and injury was caused solely by the negligence and carelessness of defendant in keeping said abutment and wing wall unguarded, and unprotected, and in such unsafe and dangerous condition."

C. D. Prescott, for appellant.

R. B. Fish, for respondent.

DANFORTH, J.—We have evidence from one side only, and on that it is not difficult to find that defendant failed in its duty to restore the highway across which its track was constructed, to such a state as not necessarily to have impaired its usefulness, or to make the passage to its bridge safe for the public. But we do not discover from the record or the argument of counsel that plaintiff's intestate was affected by its negligence, or that his injuries were caused by any default on its part.

The complaint states that he was on the evening of the 17th of December, 1881, at Fonda, "and started to go from thence to Fultonville where he resided, and in attempting to approach and cross the bridge in the night time, fell over the wing wall of the bridge and was killed."

The evidence shows that he was found between eleven

and twelve o'clock of the night of that day, lying on the track under and near the bridge badly hurt. The physician who was soon in attendance discovered slight, superficial scalp wounds, no broken bones, but "he was suffering from 'shock concussion,'" and from this cause soon after died. He was hardly able to make a sound, soon became unable to speak, and gave no explanation of the circumstances which led to his condition. The same witness testified that the injury was such as might have been caused by falling from the abutment of the bridge on the railroad track or from a car or by a blow, "but the probability was, from the general condition of the man, that it was a fall."

It was evident that the jury supplied an important but unproven fact by mere surmise, and not on inference. They assumed that the deceased was at the wing wall going towards, or was on the bridge when the accident occurred. But of this there was no evidence. He was not seen at the bridge, or upon or at its approaches. The record does not show that he was during the evening even going towards the bridge or his home, which lay beyond the bridge, or that he was intending to do so. There was literally no evidence to show how the deceased came to the place where he was found. He was seen at the Montgomery hotel in Fonda, between five and six o'clock in the afternoon; at eight or half-past eight he was at Snell's hotel in Fonda, "which," the witness says, "was on the road going from Fonda to Fultonville, by the street railroad." Another witness says:

"About eight or half-past eight, I saw him up the street in the village of Fonda. * * * I saw him go down street toward the Montgomery hotel." And on the same evening about a quarter before nine, he was seen "at the meat market at Fonda." Nothing more appears as to the whereabouts or the intentions of the deceased on the evening or night of his death.

We find, therefore, that the appellant's counsel is right in the assertion that there is no evidence that the deceased was

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" on the bridge that night, or that he was seen going in that direction. It could therefore only be conjectured that the intestate was upon the wall or bridge, but there was no basis in the evidence to support the conclusion, and without that fact established, the condition of the bridge becomes unimportant.

The judgment appealed from should therefore be reversed, and a new trial granted, with costs to abide the event.

All concur.

NELLIE CARD *et al.*, as executors, etc., Respondents, v. THE MANHATTAN RAILWAY COMPANY, Appellant.

Court of Appeals, November 23, 1886.

Reversing same case, 37 Hun, 644, mem.

Negligence. Contributory.—Where, in an action to recover damages against an elevated railway company for alleged negligence in causing the death of plaintiff's testator, the plaintiff's proof shows that, after the gate was closed and the train in motion, the testator had hold of the stanchions of the platform, clinging to them as the train moved while the gateman was pushing him away, a motion for a non-suit should have been granted.

This action was brought to recover damages for alleged negligence, causing the death of plaintiff's testator.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered on a verdict.

E. S. Rapallo, for appellant.

S. W. Fullerton and *E. W. Simmons*, for respondent.

FINCH, J.—The opinion recently delivered in the case of *Solomon v. Manhattan R'way Co.* (103 N. Y. 437), substantially covers all the questions raised by this appeal and makes it our duty to reverse the judgment of the courts below.

Opinion of the Court, by FINCH, J.

In both cases, after the gates were shut, and the intending passenger was excluded and the train was in motion, the injured party clung to the moving cars and was thereby killed. In the one case the deceased had his foot upon the car step, and was obviously making a physical effort to get upon the train; in this case the trial court deemed it debatable, whether the deceased was endeavoring to get upon the car or was merely walking along by the side of the moving train expostulating with the gateman. But disregarding all the evidence of the defense and taking as true the plaintiff's proofs, two facts remain undisputed. After the gate was closed and the train in motion the excluded passenger had hold of the stanchions of the platform, clinging to them as the train moved while the gateman was pushing him away.

Three witnesses for the plaintiff saw the accident. The wife and sister observed only the gateman pushing the deceased at a moment when they are unable to say whether the train had started or not; but the third witness, a passenger in an adjoining car and apparently wholly disinterested, testifies distinctly that after the gate was slammed and the train in motion, the deceased was holding on to the iron standard supporting the roof of the platform while the gateman was trying to push him away, and that this continued until the deceased disappeared from sight.

It is not material whether the act of the deceased should or should not be deemed a physical effort to get upon the car. It was an interference with the moving train obviously dangerous and imprudent, from which the injury resulted, and for which there was no necessity or excuse. The motion for a nonsuit should have been granted.

Judgment reversed, new trial granted, costs to abide the event.

All concur, except DANFORTH, J., not voting, and RAPALLO, J., taking no part.

ALEXANDER C. MORRISON, Respondent, v. JOHN VAN BENTHUYSEN *et al.*, as Executors, etc., Appellants.

Court of Appeals, November 23, 1886.

Compulsory Reference.—Where the only accounting requisite or sought in an action is to ascertain the value of property fraudulently sold, the value of its use, and, possibly, the amount of insurance realized for a part which has been destroyed by fire, but no accounting of partnership assets is asked for on either side, and none can be had, these are purely items of damage, involve no long account, and do not authorize a compulsory reference.

Appeal from an order of the general term of the supreme court, reversing a special term order directing a compulsory reference.

N. C. Moak with Messrs. Doyle & Fitts, for appellants.

E. F. Bullard, for respondent.

FINCH, J.—This appeal involves a question of power to order a compulsory reference. The special term made such order, but the general term reversed it, holding that no power existed to grant it. The action was an equitable one. The complaint, in substance, alleged that the assignor of the plaintiff became the owner through an execution sale of the interest of one Thompson in the partnership property of Thompson & Howocks, and so entitled to ascertain and recover that interest; that, upon judgments and executions against the partnership property, the whole of it was sold to George Warhurst at a price very far below its actual value; that the sacrifice was occasioned by the

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fraudulent conduct of Warhurst in preventing purchasers from bidding by a false representation of a chattel mortgage incumbrance, and a direct bargain with another judgment creditor not to bid; that Warhurst transferred the property purchased to the defendants, Jane Van Benthuyssen and Annie Howocks, by a conveyance made without consideration, and with a fraudulent intent; that Warhurst is dead, and the defendant Nuttall is his executor, and Thompson went into bankruptcy, and all his rights passed to the defendant Hicks, as assignee; that Howocks, by a compromise arrangement, had satisfied all the debts of the firm; and that Warhurst and his fraudulent vendees had used some of the property purchased, had sold some, and collected insurance money upon a portion destroyed by fire. The relief asked is that the sale to Warhurst be set aside; that his estate and his fraudulent vendees' account for the use of the property, and its value; that the Warhurst judgments be satisfied out of those assets, and the balance be paid to plaintiff and Thompson's assignee; and that a receiver be appointed to sell the property, and give to the plaintiff two-thirds of it, that having been Thompson's proportion of the capital.

To this action Howocks, one member of the firm and the sole surviving partner, is not a party. No accounting of the partnership assets is asked for on either side, and none can be had in his absence. It is not for us to conjecture how the plaintiff's action can be maintained without making Howocks a party. If it can be, it will be because no partnership accounting is required. If it cannot be, the plaintiff may be obliged to amend his complaint, and bring in Howocks as a party, and then, for the first time, such an accounting will become possible and necessary. But as the case stands, the only accounting requisite or sought is to ascertain the value of the property fraudulently sold, the value of the use, and, possibly, the amount of insurance

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realized. These are purely items of damage and involve no accounting. *Camp v. Ingersoll*, 86 N. Y. 433.

The theory of the plaintiff is that he will be entitled to the whole or two-thirds of such aggregate values. He, perhaps, may seek to uphold that theory by the contention that the sale, though void as to plaintiff, is good as to Howocks, who does not repudiate it, and so has lost all interest in the question, or in the fruits of the litigation; or upon some other ground, as yet undisclosed. But, whatever else may be true about the case, it seems entirely certain that there can be no receivership of the partnership assets; and no administration and settlement of its affairs, in an action to which the sole surviving partner is not a party. It follows that no long account was involved in the action, and that the decision of the general term was correct.

The order appealed from should be affirmed, with costs.

All concur.

ANGELINE C. JOHNSON, *et al.*, as Administrators, etc.,
Respondents, v. MARIA J. MYERS, Executrix, Appellant.

Court of Appeals. November 23, 1886.

Affirming same case, 35 Hun, 666, Mem.

1. *Evidence. Opinion.*—In an action for services rendered, a question asked of a witness who has some knowledge of the fact, as to what proportion of plaintiff's intestate's time was devoted to defendant's testator's business, calls for a fact within the witness' knowledge, and not for an opinion.
2. *Same. Value of Services.*—The character and ability of a person has much to do with the value of his services, where the duty to be done requires the best of judgment, a skill and ability beyond the average, is largely of a confidential character, and has no common

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and general market value; and the person chosen to perform it has a right to be paid upon the standard of the capacity which enters into the work and forms the principal and essential value of the services.

Appeal from a judgment of the general term of the supreme court, affirming judgment entered on report of a referee.

William G. Tracy, for appellant.

Chas. A. Hanley, for respondents.

FINCH, J.—The plaintiff, as administratrix, recovered compensation in two separate actions for services rendered by Johnson to Myers in his lifetime, and to his executrix after his death. Myers appears to have been an able and successful, though somewhat illiterate, business man, whose enterprises were varied and extensive, widely scattered as to locality, and involving heavy risks of capital, and obstructed by adverse interests, and the frequent hostility of litigation. In executing his plans, he found it both necessary and wise to secure and use intelligent and trained assistance. To some extent he obtained the aid of Johnson, by joining him as an associate in his enterprises; but beyond that he employed him largely in his own affairs, putting confidence in the ability and honesty of the chosen agent. Necessarily the line between the partnership work of Johnson and that performed by him for the benefit of Myers individually was extremely difficult to draw, and, after the death of both parties, it has made an accurate and precise separation impossible, and to be accomplished only approximately, and by careful judgment, founded upon such evidence as the nature of the case permitted. No person was so likely to know, in a general way, the amount of service rendered by Johnson, as his wife. His coming and going; his telegrams and letters; the litigations calling him abroad; the meetings and conversations of the

parties,—would be within her knowledge to some considerable extent; not always accurately, in detail, but generally as a whole.

She testified that, in the summer of 1870, Myers, complaining of his arm, and saying that Johnson knew more about his business than any man living, sought his help to “settle up his business,” and Johnson entered upon the work and furnished the assistance. That she told the exact truth in this respect is put beyond dispute by the letters of Myers, written mainly by his then secretary and agent Yoe. Under date of July 6, 1870, the latter writes that Myers is sick; and adds: “He wishes you to look after his affairs generally, until he is able to return.” Under date of July 14, 1870, Yoe writes again that Myers is still sick, and “he desires you to look after his matters; and that, if you desire any one to counsel in his affairs, you will confer with T. B. Fitch, Esq., and if necessary, come to Syracuse to see him.” Then follow thirty-four letters, running down to the middle of October, when Myers went to New York, where he died a few weeks later. The burden of Myers’ letters is the detail of his business to be attended to. Much of it concerned the sale of the Trenton Arms Company to De Muir. While it is true that Johnson and Myers were joint owners of that property, the title stood in the name of Myers, who sold the whole of it to De Muir as early as December, 1869, and from that time on owed Johnson his proportion of the purchase price. Further subjects are the collections of mortgages, the discharge of judgments, the sale of houses, and the difficulty with Randall and Williams, in which Johnson seems to have had no personal interest. Beyond any question, the statement of Mrs. Johnson was true.

She further testified to an arrangement made with Fitch, after Myers’ death, for the rendition of services to the estate. How entirely true that is becomes evident from the multitude of Fitch’s letters calling upon Johnson, in

every conceivable shape, for information, advice and service; from the account of moneys received by Johnson, and paid over by him, running to about \$100,000; and from numerous vouchers, in which the estate is found paying Johnson for his expenses and returning to him moneys advanced. Mrs. Johnson further said that, from 1864, her husband was more or less occupied with the affairs of Myers and his estate. This also was undeniably true. The defendant elicited from her, on cross-examination, the fact that, in 1864, while they lived in Trenton, Johnson came to Syracuse every week, during six weeks, at the request of Myers, and that she knew it was on Myers' individual business: that he went to Brooklyn, attending to litigations, and consulted with lawyers. Many letters during this period tend to corroborate her statements.

But what is quite as conclusive as a detailed examination of the services is the defendant's own request to find, marked "No. 6," and couched in this language: "That said William Johnson rendered some services for said Austin Myers during his life-time; that the services so rendered by him were reasonably worth the sum of \$3,600, and no more; and that said item is a proper charge on this accounting, in favor of the estate of said Johnson." In the face of this admission, it requires some nerve to insist that Johnson's services rendered all related to the joint property.

Mrs. Johnson, swearing to this knowledge, shown to be correct, and with abundant opportunity to know, and that the best of any living person, was then asked what proportion of Johnson's time was devoted to Myers' business. To this it was objected that the witness was incompetent to give an opinion, and that it appeared that Johnson and Myers were partners. The objection was overruled and an exception taken. The witness answered: "One-half, from 1864 to the time of Johnson's death." The objection was not sound. The question called for a fact within the wit-

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ness's knowledge, and not for an opinion. If a person, familiar with the character of Myers' business, had been asked how much of one man's time it would have taken to conduct or transact it that would have called for an opinion; but if asked how much time it did take, no opinion would be sought, but a fact founded upon knowledge. That was the character of the question put to Mrs. Johnson. A fact was asked for of which she had some knowledge, and which she could answer to the extent of that knowledge.

How gravely inconsistent it would be for us to hold the admission of this question, error, is apparent from our own ruling in a much more debatable case. *Hallahan v. N. Y., L. E. & Western R. R.*, 102 N. Y., 195. There the witness, who saw the passenger, answered: "I should judge" that deceased's elbow was not out of the window from the position that he held in the car. A motion to strike out the answer was denied on the ground that if the answer seemed an opinion it was in effect not one, but at least was admissible as an opinion founded upon knowledge. Estimates of time and value thus founded, are always admissible, and no objection was taken in this case that Mrs. Johnson had not sufficient knowledge. She swore that she had, the opportunity was certainly hers, and the facts corroborate and support the truth of her answer. Bearing upon them, as we have said, was a voluminous correspondence, read in evidence, the details of the defendant's own account against Johnson, which show a large mass of business done by him for Myers and his estate, resulting in the receipt and payment of very considerable sums of money, and the evidence of other witnesses as to services rendered and the value of the same. The finding of the referee upon the subject was not unreasonable, or outside of the inferences which were possible from the proof.

An exception was taken to a question put to Jewett, which was this: "Have you ever been with Col. Johnson

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when he was professedly in Capt. Myers' business?" The ground of the objection was that the question called for the declaration of Johnson in his own favor. That was not the object or effect of the evidence. The purpose was not to prove by Johnson's statements that he was at work for Myers, but to show that the witness was acquainted with the kind of business in which Johnson was engaged, and which by other evidence it was claimed to have been shown, was that of Myers with a view of obtaining from the witness his estimate of the value of Johnson's services. This is made quite apparent by what immediately preceded the objection. Jewitt had said that he saw Johnson engaged in work which the latter represented to be that of Myers. A motion was made to strike out Johnson's declaration in the absence of Myers, and the motion was granted. The referee, therefore, certainly did not understand the word "professedly," used in the question as calling for a class of evidence just held by him to be inadmissible, and must have understood the inquiry as merely preliminary to the proof of value afterward given. It may be added that the answer was harmless. It showed the intestate ostensibly engaged in services for Myers, but not that he was so engaged or what the services were. The referee quite certainly understood that those facts were not proved by Jewitt.

The plaintiff was permitted to show what the value of the services of such a man as Col. Johnson was, and to this there was an exception. It is now argued that his character and ability had nothing to do with the value of the services. We think it had much. The duty to be done required the best of judgment, a skill and ability beyond the average, and was largely of a confidential character. It had no common and general market value. The work was not merely ministerial or a service which anybody could render. The business was varied and complicated and in many directions responsible, and the man chosen to perform it by reason of his capacity and ability had a right to be

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paid upon the standard of the capacity which entered into the work and formed the principal and essential value of the services.

The remaining questions argued respect the counterclaims of the defendant which were disallowed upon the trial. In the main they depended upon pure questions of fact involving the credibility of witnesses and the drift and effect of items in the books of account. They were argued exhaustively before us, leaving upon our minds a conviction which a careful subsequent examination has strengthened, that they furnish no ground for a reversal of the judgments. The reasons given by the referee and the general term substantially cover the ground and meet our approval, and a renewed discussion of them is neither necessary nor suitable.

Each of the two judgments should be affirmed: That against the defendant, as executrix, without costs; and that against her as an individual, with costs.

MILLER, EARL and DANFORTH, JJ., concur; RUGER, Ch. J., RAPALLO and ANDREWS, JJ., dissent.

ANGELINE C. JOHNSON, *et al.*, Administrators, etc., Respondents, v. MARIA J. MYERS, Executrix, etc., Appellant

Court of Appeals, November 23, 1888.

Reversing same case, 35 Hun, 666, Mem.

1. *Appeal. Disputed facts.*—It is the general rule of the court of appeals to follow the conclusions of the courts below, where questions turn upon disputed facts, unless for some very obvious and sufficient reasons.
2. *Executors. Claim against Estate. Costs.*—Costs will not be awarded to a claimant, though his claim against an estate has been duly exhibited and properly presented to the executor before suit brought, and he is successful in obtaining a judgment, if the defense interposed has been reasonable and proper.

Opinion of the Court, by FINCH, J.

Appeal from an order of the general term of the supreme court, affirming an order granting costs and an additional allowance in an action against an executrix.

W. G. Tracy, for appellants.

C. A. Hawley, for respondents.

FINCH, J.—An order was made in this case granting costs to plaintiff and an additional allowance. It is resisted, upon this appeal, on the ground that the plaintiff's demand was not presented to the executrix for payment before the commencement of the action, and that such payment was not unreasonably resisted or refused. Both questions turn upon disputed facts, as to which it is the general rule of this court to follow the conclusions of the courts below, unless for some very obvious and sufficient reasons. *Field v. Field*, 77 N. Y. 294. The statute (3 Rev. St. [5th Ed.] 175, §§ 39, 40) authorizes publication of a notice to creditors, "requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to such executor or administrator," etc., and allows the latter, upon such presentation, to require production of vouchers and an affidavit of the claimant.

The proofs on the part of the plaintiff show that her claims with the books and vouchers on which they rested, were fully "exhibited" to the authorized agent of the executrix before the commencement of the action, and were examined and rejected by the assertion of counterclaims sufficient to extinguish them, and all ultimate liability denied. This fact is no further disputed than by an affidavit of the defendant's attorney that no "formal claim" was ever made, though he admits "informal negotiations for a settlement." But while the courts below were justified in holding that the plaintiff's claim was duly exhibited and properly presented, the examinations we have made of the facts in controversy very strongly impress us with the con-

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viction that the defense of this action was reasonable and proper; and, while the defendant estate was unsuccessful in the end, there was abundant reason, in the complicated nature of the accounts, in the great amount of business transacted, and in the supposed and actual existence of grave counterclaims, to justify the defense actually made, and prevent us from holding it to have been unreasonable. Judgment was demanded for more than \$60,000, with a large amount of interest. Judgment was rendered for a sum very materially less, and still further reduced by a deduction of the general term of more than \$10,000. We discover no trace of bad faith in the defense interposed, but much to justify the inquiry and examination which it compelled.

For this reason we think costs should not have been awarded, and we therefore reverse the order appealed from.

All concur.

CLARISSA LAMMER, *et al.*, Appellants, v. HELEN G. STODDARD, as Executrix, etc., *et al.*, Respondents.

Court of Appeals, November 23, 1886.

1. *Mortgage. Payment.*—Where a bond and mortgage were given forty-eight years before the mortgagor's death, and thirty-four years before the mortgagee's death, and during most of this time the former had possessed ample pecuniary ability to pay, while the latter did not have much means, nor have the bond and mortgage in her possession at the time of her death, though the mortgage was found, after the death of both parties to be uncanceled of record, the non-production of the bond and mortgage was held to furnish very satisfactory and conclusive evidence of their payment.
2. *Same. Limitation.*—The statute of limitations, as against the trustee of an actual, express, subsisting trust, does not begin to run against the beneficiary, until the trustee has openly, to the knowl-

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edge of the beneficiary, renounced, disclaimed, or repudiated the trust.

3. *Same.*—In case of a trustee *ex maleficio*, or by implication or construction of law, the statute begins to run from the time the wrong was committed by which the party became chargeable as trustee by implication.

Action brought to recover the amount of a loan of trust money.

Joseph Lammer left personal property amounting upwards of \$36,000, and in his will he bequeathed to his wife the sum of \$2,000, and created a trust as follows:

"I give and bequeath unto my said wife, Mary, the further sum of \$3,000, lawful money aforesaid, to be paid to her as soon as conveniently may be after my decease, in trust, nevertheless, that she, my said wife, shall have, use and take the interest accruing and to arise from the said \$3,000, during the minority of my sons Joseph and John and daughter Clarissa, to be applied for and towards the support and maintenance and education of said three children, and to pay to the said children, Joseph, John and Clarissa, as they shall respectively arrive at the age of twenty-one years, the sum of \$1,000 each.

"My will is that the sum of \$3,000, hereinbefore given in trust to my said wife, Mary, shall be by her put at interest by good bond and mortgage security upon real estate, to be approved of by my executors hereinafter named, and in case either or all of my said children, Joseph, John and Clarissa, shall die during their minority and without lawful issue, then my will is, and I do hereby give and bequeath unto my said wife, Mary, the sum or sums of money which such child or children would have been entitled to receive if he, she or they had lived to the age of twenty-one years."

And he appointed his wife and his son Edward executors of his will.

Opinion of the Court, by EARL, J.

The will was admitted to probate, and the trust fund was invested in a bond and mortgage, which was paid off in 1836, and subsequently was loaned by the executrix to Edward Lammer, together with her \$2,000, and secured by a bond and mortgage upon premises on which there was a prior mortgage which was afterwards foreclosed, and no surplus was left to apply on the second mortgage. Clarissa, on the death of her mother in 1870, was appointed administratrix of her estate, and as such commenced an action against the executrix of Edward's will, to enforce the trust as to the \$3,000.

Appeal from a judgment of the general term of the city court of Brooklyn, affirming a judgment in favor of the defendants.

P. V. R. Stanton, for appellants.

Jesse Johnson, for respondents.

EARL, J.—The finding of the trial court, affirmed by the general term, that Edward Lammer had paid to Mary Lammer the amount loaned to him by her, which was secured by his mortgage, was founded upon sufficient evidence, and concludes us. The loan was made forty-eight years before Edward's death, and thirty-four years before Mrs. Lammer's death, and during most of that time he possessed ample pecuniary ability to pay. She was not shown to possess much means, and presumably needed the means for the support of herself and infant children. She and Edward always resided near each other, and, during twenty years, he made a considerable allowance to his sister for the benefit of herself and mother, thus showing that he was not only disposed to be just, but liberal. The bond and mortgage were not in her possession at her death, were not then shown to be in existence, and were never, until shortly before the commencement of this action, by either of the plaintiffs, the youngest of whom at her death

was forty-two years old. Under such circumstances, the non-production of the bond and mortgage furnishes very satisfactory and conclusive evidence of their payment. *Bergen v. Urbahn*, 83 N. Y. 49.

But the statute of limitations furnishes an equally conclusive defense to this action. If it be assumed that the trust fund was loaned to Edward Lammer with notice of the trust, under such circumstances that the trust, within a proper time, could have been enforced against him or his estate, the lapse of time would still stand in plaintiff's pathway. If this were an action to recover the debt evidenced by the bond and mortgage, it is conceded that it would have been barred. But the action is to establish and enforce a trust, and hence the claim is made that it is not barred. It is undoubtedly generally true that, as against a trustee of an actual, express, subsisting trust, the statute does not begin to run against the beneficiary until the trustee has openly, to the knowledge of the beneficiary, renounced, disclaimed, or repudiated the trust. But Edward Lammer was not the actual trustee of this fund, and he never acknowledged a trust as to the money loaned him. He could, at most, have been declared a trustee *ex maleficio*, or by implication or construction of law; and in such a case the statute begins to run from the time the wrong was committed by which the party became chargeable as trustee by implication. *Wilmerding v. Russ*, 33 Conn. 67; *Askhurst's Appeal*, 60 Pa. 290; *McClane v. Shepherd* 21 N. J. Eq. 76; *Decouche v. Savetier*, 3 Johns. Ch. 190; *Ward v. Smith*, 3 Sandf. Ch. 592; *Higgins v. Higgins*, 14 Abb. N. C. 13; *Clark v. Boorman*, 18 Wall. 493; *Perry, Trusts*, § 865.

We, therefore, see no reason to doubt that the judgment below was right, and it should be affirmed, with costs.

All concur.

ROXANA C. LARKINS, Respondent, v. PAUL C. MAXON,
Administrator, etc., Appellant.

Court of Appeals, November 23, 1886.

Modifying decision in same case, 35 Hun, 665, Mem.

1. *Reference. Inconsistent Findings.*—A finding of a referee that the claimant performed services for defendant, at his request, as a domestic in his family, is not inconsistent with a finding that her relations in his family were affectionate and kindly and like those of a daughter.

See note at end of case.

2. *Same. Disbursements.*—A claimant upon a reference, under the statute, of a claim against the estate of a deceased person, is entitled, if the prevailing party, to recover the necessary disbursements. The provision of the former Code allowing such disbursements was not repealed by the repealing act of 1880, but the right thereto was preserved by the qualifying section of said act.

Reference, under the statute, of a disputed claim against an estate.

Appeal from a judgment of the general term of the supreme court, modifying and affirming, as modified, a judgment of the special term, entered upon the report of a referee.

Elon R. Brown, for appellant.

W. H. Gilman, for respondent.

PER CURIAM.—We do not think that the findings of the referee were inconsistent. A domestic may be treated, in many respects, like a daughter, without holding that relation to the employer. The facts were sufficient to establish at least an implied contract for compensation; and, so far as there was an express one, it has not been fulfilled by the device and legacy given by Mrs. Sprague. The destroyed

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will of Sprague and his wife bore somewhat on the actually existing relations between the parties, and formed incidents in the history of those relations. Since the referee found as a fact the existence of an implied contract, his opinion about an understanding "not amounting to contract" was immaterial.

From the judgment entered on the report of the referee the general term struck out the disbursements taxed and allowed, upon the ground that section 317 of the old Code of procedure, which provided for their taxation, was repealed by the repealing act of 1880, and the right was not preserved by subdivision 8 of section 3 of that act. Upon the construction of that saving clause there has been a difference of opinion in the supreme court. In *Miller v. Miller* (32 Hun, 481), and *Dagget v. Mead* (11 Abb. N. C. 116), the saving clause was held to prevent the destruction only of the right to such disbursements as were provided for in the Revised Statutes, and, there being none such in a case like the present, there was nothing saved. To the contrary are *Krill v. Brownell*, 40 Hun, 72; *Sutton v. Newton*, 15 Abb. N. C. 452; *Hall v. Edmunds*, 67 How. Pr. 202; and *Overheiser v. Morehouse*, 16 Abb. N. C. 208. We think these last cited cases establish the true construction of the subdivision referred to, and that it was intended and did preserve the right to disbursements given by the former Code upon the reference of a claim against a decedent.

The order of the general term striking out disbursements should be reversed, and the judgment as entered at special term be affirmed, with the costs of the appeal to this court.

All concur.

NOTE ON THE EFFECT OF INCONSISTENT FINDINGS MADE BY THE COURT OR REFEREE.

There has been no particular change produced in this respect by the provisions of the present Code, and the same rule is adhered to by the appellate courts.

Effect of Inconsistent Findings made by the Court of Referee.

In *Tompkins v. Lee*, 59 N. Y. 662, the case, in an action tried by a referee, as settled, contained a statement of facts as found by the referee, other and additional to those contained in his report. The defendant contended that the additional findings were in direct conflict with the findings in the report, and that the latter must yield. It was held that, if this was so, it would present the question whether the finding of the referee, embraced in his report, or the findings settled by him in the case, should be regarded as correct by the court, and that the latter must be assumed as correct, and the former, so far as it conflicts, must be disregarded.

In *Schwinger v. Raymond*, 83 N. Y. 192, there were findings, in the referee's report, of less fullness and somewhat conflicting with those made upon the requests to find, and it was held that, where they vary, the appellants are entitled to those most favorable to themselves, and may rely upon them in aid of their exceptions. Where the findings, contained in the case as settled by the referee, differ from those in the report, the former must still be held to be correct and represent his final conclusions, as it is upon the case that the exceptions stand. See *Tompkins v. Lee*, *ante*.

In *Bonnell v. Griswold*, 89 N. Y. 122, it was held that, where a referee's findings of fact, are conflicting, the defeated party is entitled to the benefit of those most favorable to him, in aid of his exceptions to the conclusions of law.

In *Bennett v. Bates*, 94 N. Y. 354, it was held that it is the duty of the court of appeals to harmonize the findings of a trial court so as to arrive at the real intention in making them, if it can be done, and an intention to reverse its deliberate finding, several times repeated in course of the settlement of the case, upon a mere collateral finding in which an inadvertent and immaterial expression was used in describing an irrelevant fact, will not be imputed.

In *Health Dept. of N. Y. v. Purdon*, 99 N. Y. 237, it was held that, when the findings of the trial court are apparently inconsistent, it is the duty of the appellant tribunal, if possible, to reconcile them and give effect to the real meaning and intent of the court in making them. See *Bennett v. Bates*, *ante*. But the application of this rule is not called for where there is no irreconcilable repugnancy in the findings.

In *The First Nat. Bank of Portchester v. Halsted*, 20 Abb. N. C. 155, it was held that, as between conflicting and contradictory findings of fact, the party appealing is entitled to rely upon those, as having been accurately made, which are the most favorable to himself.

In *Sisson v. Cummings*, 35 Hun, 22, the rule which is to be applied, where a contradiction exists between the findings of fact and conclusions of law appearing in the decision, signed by the judge or referee, and the findings made upon the special requests theretofore submitted

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by either of the parties, was considered, and the old rule that in such cases the special findings are to control, was criticised and doubted.

In *Pappenheim v. The Met. El. R. R. Co.*, 57 N. Y. Super. Ct. 281, it was held that, whenever two findings of fact are inconsistent with the conclusions of law and the judgment, although the same was made by inadvertence, the appellant is entitled, in support of his exceptions, to have that finding taken as true which is the more favorable to himself; and, in support of this rule the following cases are cited: *Bonnell v. Griswold*, *ante*; *Schwinger v. Raymond*, *ante*; *Conselyea v. Blanchard*, 103 Id. 231; *Bedfield v. Bedfield*, 110 Id. 671; *Green v. Roworth*, 113 Id. 462.

In *Welsh v. The Man. El. R. R. Co.*, 57 N. Y. Super. Ct. 408, the court found at the request of defendant as follows: "The evidence does not establish any definite amount of damages for which any judgment can be rendered." The appellant claimed that this finding was inconsistent with some of the prior findings, and that for this reason the judgment should be reversed. This finding does not state a fact, but is a conclusion of law, and if erroneous, cannot affect or overrule the correct conclusion of law that the plaintiff was entitled to a judgment for the amount of the damages that the court finds as a fact was sustained by him. And it was held that no principle of law requires the court to reverse a judgment because of inconsistent conclusions of law, when the judgment directed to be entered is in accordance with the correct conclusion of law on the facts found.

In *Bohlen v. The Met. El. R. Co.*, N. Y. Super. Ct. March 4, 1890, it was held that, when the findings of fact are in irreconcilable conflict, so that it is impossible to say which is correct, the error cannot be corrected after judgment on motion made at a term other than that at which the judgment was rendered. See also *Rockwell v. Carpenter*, 25 Hun. 529; *McLean v. Stewart*, 14 Id. 472; *Gardiner v. Schwab*, 34 Id. 583.

And in *Conselyea v. Blanchard*, *ante*, it was held that, if some findings of fact are more favorable to the appellant than others, he has the right upon an appeal to the court of appeals to claim the benefit of those which are most favorable to him; and so the court of appeals has repeatedly held. See *Schwinger v. Raymond*, 93 N. Y. 191; *Bonnell v. Griswold*, 89 Id. 122.

It is undoubtedly an established rule of the court of appeals that, where findings of fact, made by the court or referee, which are material to the determination of the case, are irreconcilably conflicting, it will be governed by that finding which is most favorable to the party appealing; but this ruling presupposes such a difference in the findings. *Green v. Roworth*, *ante*. So far, therefore, as these findings

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are conflicting, it is the duty of the court of appeals to endeavor to reconcile them and give to each some office to perform. It is only when this cannot, by a reasonable construction, be accomplished, that the court is bound to accept the finding most favorable to the appellant. See *Bennett v. Bates*, *ante*; *Redfield v. Redfield*, *ante*. In the latter case, it was said that: "We have held that, where the special findings of a judge or a referee differ from the findings formally made as the basis of the judgment, the appellant has the right to rely upon such findings as are most favorable to him. Those decisions were made at a time when the practice authorized the submission of proposed findings to a judge or referee after the decision of the case was rendered; and under that practice such findings were passed upon, generally weeks and frequently months after the formal findings had been made; and we held that, where such findings differed from the prior findings and contradicted them, the appellant had the right to rely upon them if most favorable to him. *Tompkins v. Lee*, *ante*; *Schwinger v. Raymond*, *ante*; *Bonnell v. Griswold*, *ante*. Since those decisions, the practice has been changed, and now the proposed findings must be presented at the submission of the case, and the presumption is, that those findings are passed upon, when the case is decided and the formal findings made. Hence, for the purpose of construing the findings, we must look at all of them, both the general and special findings, and, if they are in conflict, we must attempt to reconcile them. If, after such an attempt, we find them irreconcilable, then, now, as under the earlier practice, the appellant is entitled to take the findings most favorable to him." If the court is satisfied, upon looking at all the findings of fact and law, that the trial judge did not intend to find, and has not found, any fact in conflict with the general findings contained in his formal decision, the latter, having been approved at the general term, must stand and justify the judgment which was entered. *Id.*

In The Matter of the Estate of ELIAS W. CADY, Deceased.

Court of Appeals, November 23, 1886.

Affirming same case, 36 Hun, 122.

1. *Executors. Refusal of letters.*—Where a person, who has been appointed an executor, has been, for several years prior, in the habit of using intoxicating liquors, occasionally becoming intoxicated thereby, and latterly such use had become much more frequent than formerly, so that a greater part of the time he was under the decided influence of intoxicating liquors, sometimes indulging in protracted sprees and ending in delirium tremens; and though in the year 1879 was worth \$29,000, had become insolvent and unable to pay his debts, his improvidence was such that the surrogate might properly adjudge that he was incompetent to execute the duties of the trust conferred upon him by the will and refuse to grant him letters testamentary as such executor.
2. *Surrogate. Findings.*—The court of appeals is concluded by the findings of the surrogate, where the evidence is abundant to sustain them.

Appeal from a judgment of the general term of the supreme court affirming a decree of the surrogate's court refusing letters testamentary.

The facts and opinion of the general term are as follows:

“Appeal from a decree of the surrogate of Tompkins county, refusing letters testamentary to Charles Cady as executor of Elias W. Cady, deceased, and also removing him from the position of testamentary trustee under the said last will and testament of said Elias W. Cady.

Elias W. Cady died in the spring of 1883, leaving a last will and testament, executed in 1854, in and by which he devised the homestead property of nearly 200 acres upon certain conditions, to Charles Cady, and naming Charles and his brother Oliver as executors and trustees.

Subsequently, and on December 30, 1856, and on July

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8, 1875, the testator made codicils to his will, diminishing the devise to Charles by making increased charges thereon for the benefit of the testator's daughter Mary.

In June and September 1881, the testator conveyed to Mary Cady the homestead, being that property which had been devised to Charles, subject to certain payments to be made to her, thus leaving Charles without any interest in the will, except as executor and trustee under the same.

About 400 acres of land known as the Cramer farm, were devised to Charles Cady and Oliver Cady, in trust, to sell the same within five years and out of the proceeds to pay their sister Mary Cady \$3,000, and divide the balance equally between Mary and her two sisters Harriet S. Ferguson and Rebecca A. Dwight.

Upon the probate of the will, Oliver refused to act as executor, thereby leaving Charles Cady as sole surviving executor; and thereupon the three sisters objected to their brother Charles acting as executor and their trustee upon the ground of his alleged drunkenness, improvidence, insolvency and personal hostility and unfriendliness to them; and upon the further ground that he was seeking to injure the estate by inducing the creditors to levy upon all the personal property left by his father, claiming it belonged to him.

The objections were in writing and were verified.

During the progress of the trial had thereon before the surrogate, Harriet S. Ferguson withdrew her objections.

The surrogate found: "That Charles Cady, for several years prior to the spring of 1880, had been in the habit of using intoxicating liquors, occasionally becoming intoxicated thereby; but that about the spring of 1880 such use became much more frequent than theretofore, so that a greater part of the time he was under the decided influence of intoxicating liquors, sometimes indulging in protracted splees and ending in delirium tremens, but that for several months prior to, and especially during the pendency of the present

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proceedings, that indulgence has been less open and excessive than theretofore. That in the year 1879 Charles Cady was a man of means, he himself estimating his property at that time at about \$29,000; that since 1879 he has become insolvent and unable to pay his debts."

As a conclusion of law, the surrogate found, *first*: "That said Charles Cady, by reason of improvidence and habitual drunkenness, is incompetent to act as executor and testamentary trustee under the will and codicils of the said Elias W. Cady, deceased; that a decree should be entered denying letters testamentary to said Charles Cady as executor, and also removing him from the office of testamentary trustee under said will." This decision was made and filed March 24, 1884.

Upon the hearing there was evidence tending to establish that Charles Cady induced the creditors to levy upon and sell the personal property upon the homestead, upon an avowal that it belonged to him and that litigation would be necessary to settle the rights of the estate and the legatees in the property.

There was also a great contrariety of evidence touching the habits, acts and conduct of Charles Cady, covering a period of several years prior to the 28th of April, 1883, offered by the objectors to sustain their allegations; and also considerable evidence was offered by the appellant to overthrow the testimony offered by the objectors, and in this evidence very many contradictions are found, not necessary to be referred to in detail.

HARDIN, P. J.—Section 3 of the Revised Statutes, as amended by chapter 79 of the Laws of 1873, provides as follows, viz.: "No person shall be deemed competent to serve as an executor, who at the time the will is proved * * * upon proof, shall be adjudged by the surrogate to be incompetent to execute the duties of such trust by reason of drunkenness, dishonesty, improvidence or want of

understanding." 3 R. S. (7th ed.) 2289. Section 2636 of the Code provides that, after the proof of a will, letters testamentary shall be issued to the person or persons named in the will unless a person interested, or a creditor in the estate, files an affidavit, setting forth specifically one or more legal objections to granting the letters to one or more of the executors, or stating that he is advised and believes there are such objections, and that he intends to file a specific statement of the same. It is provided in section 2637 that "the surrogate must inquire into an objection filed, as provided in the last section, and for that purpose he may receive proof by affidavit, or otherwise, in his discretion. If it appears that there is a legal and sufficient objection to any person named as executor in the will, letters should not be issued to him except as prescribed in the next section." It may be observed that this section provides that investigation may be had upon proof by affidavit, or in such other manner as in the discretion of the surrogate shall be allowed. Manifestly it was the intention of the legislature to provide for a somewhat speedy and summary determination of the questions raised by objections made to the competency of a person to serve as executor. In *McGregor v. Buel*, where the question under consideration was whether especial letters of administration should be issued or not, to preserve the property pending an appeal from the probate of a will; at page 169, 24 N. Y. Judge DENIO observes, viz. :

"The statute, in terms, makes the granting of such letters discretionary, and the propriety of issuing or holding them is plainly dependent upon the exigencies of the estate, the amount and situation of the estate and other circumstances which require to be judged of summarily, and are not suitable to be litigated through the courts upon appeal. The determination of the surrogate upon such questions is, as it should be, summary and exclusive." While that authority is not precisely in point upon the question now before us,

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we think the quotation not inopportune, as after a full consideration of the great volume of evidence taken before the surrogate in this case, we are disinclined to disturb the findings of fact made by the learned surrogate; he saw the witnesses, heard them testify, and upon a question involved in so much conflict, was better prepared to reach a correct result than we can be by scanning the evidence found in the appeal book. The primary question to be considered upon all the evidence before the surrogate was whether or not the improvidence of Charles Cady was shown to be such that the surrogate might properly adjudge that he was incompetent to execute the duties of the trust conferred upon him by the will. In *Coope v. Lowerre* (1 Barb. Ch. 45) the chancellor says, viz.: "The improvidence which the framers of the Revised Statutes had in contemplation as a ground of exclusion is that want of care or foresight in the management of property which would be likely to render the estate and effects of the intestate unsafe and liable to be lost or diminished in value by improvidence in case administration thereof should be committed to such improvident person."

The principle of exclusion of this part of the statute is based upon the well known fact that a man who is careless and improvident, or who is wanting in ordinary care and forecave in the acquisition and preservation of property, for himself, cannot with safety be intrusted with the management and preservation of the property of others. In *McMahon v. Harrison* (6 N. Y. 448), it was held that the fact that a man was a professional gambler is presumptive evidence of such improvidence as to render him incompetent to discharge the duties of executor or administrator, and the definition which we have quoted from the chancellor, quoted in *Coope v. Lowerre* (*supra*), was there approved, and the judgment of the court was, that such an improvident person ought not to be intrusted with an estate. In *Emerson v. Bowers* (14 N. Y. 449), the court, in speaking

of improvidence, says: The term evidently refers to habits of mind and conduct which become a part of the man, and render him generally, and under all ordinary circumstances, unfit for the trust or employment in question. That definition was referred to approvingly by the court in *Freeman v. Kellogg*, 4 Redf. 224. Under the interpretation of the statute given by the authorities to which we have referred, we think the evidence before the surrogate amply justified him in concluding that the executor, by reason of his improvidence, was incompetent to execute the duties of the trust, and that he was justified in withholding letters testamentary from him. It was urged, on the argument before us, that considerable force should be given to the fact that the testator had selected the executor. In considering that fact it must be borne in mind that subsequent to 1854, by virtue of codicils and conveyances made by the testator in his lifetime, he gave a different direction to that portion of his estate which he originally intended for his son, Charles Cady, and that, at the time of the death of the testator, the only interest which remained under the will to pass to the executor was such as he might derive by virtue of the office as executor and trustee. However, it was decided by the chancellor in *Wood v. Wood* (4 Paige, 299), that no great significance attaches to the circumstance that the testator had named the executor. He says in that case, viz: "It is not material to inquire whether the testator was aware of the want of responsibility in the executor at the time of making of the will, for if the testator had been so improvident as to commit the administration of his estate to one whose circumstances are such as not to afford adequate security for the faithful discharge of his trust, the court must interfere for the purpose of protecting the estate against the effects of such improvidence." This language of the chancellor was quoted approvingly in the case of *Freeman v. Kellogg*, 4 Redf. 225. We are disposed to approve of the sentiment expressed by the surrogate of New York county

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in *Martin v. Duke* (5 Redf. 601), wherein he says, viz.: "Every case must be considered by itself; in each the question for the surrogate is, is it safe to put this estate in the hands of the person named as executor; can he be trusted to administer it faithfully and honestly as directed by the will?" We think in this case some attention should be given to the circumstances that two of the three beneficiaries under the will, who were adults and capable of understanding their legal rights, objected to the appointment of the person named as executor; also some attention to the threats shown to have been made by the executor in respect to his intentions in respect to the maladministration of the estate if he should obtain possession of it.

While these considerations are not at all controlling they may properly have had weight with the surrogate in considering the mass of evidence bearing upon the vital question submitted for his determination. We are not warranted in saying that the findings were erroneously reached by the surrogate, and that his determination in withholding letters testamentary was not in accordance with the weight of evidence before him. We, therefore, upon this branch of the case, sustain the result reached by the surrogate. *Second.* In respect to the removal of Cady as testamentary trustee, it may be observed that the surrogate came to the conclusion that he ought to be removed, at the same time that he reached the conclusion that he ought not to be appointed executor. Section 2817 of the Code of Civil Procedure authorizes the surrogate to make such a removal of a testamentary trustee, "where, if he was named in the will as executor, letters testamentary would not be issued to him by reason of his personal disqualifications or incompetency." We are of the opinion that the evidence before the surrogate warranted the conclusion reached by him upon the question appertaining to the removal. The surrogate had jurisdiction to make the removal. Code Civ. Pro., § 2817; *Savage v. Gould*, 60

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How. 254, and the citations founded therein in the opinion of BOARDMAN, J. We are of the opinion that the rulings upon the hearing by the surrogate were sufficiently favorable to the appellant. Section 2637, as we have before intimated, provides for such an inquiry as was had before the surrogate, being upon affidavit or in such other manner as within the discretion of the surrogate should be ordered by him. We have found no error in the course of the trial calling upon us to disturb the conclusion found by the surrogate. We think the decree of the surrogate of Tompkins county should be affirmed, with costs against the appellant personally."

George E. Goodrich and H. V. Howland, for appellant.

S. D. Halliday, for respondent.

EARL, J.—We have carefully read and considered the evidence in this case, and find it to be abundant to sustain; the findings of the surrogate; and those findings conclude us. We agree in the main with the opinions pronounced by the surrogate and at the general term, and it would be a waste of labor to travel over the same grounds in the exposition of the law applicable to the facts of this case in them so fully and ably set forth.

The judgment should be affirmed, with costs against the appellant.

All concur.

Statement of the Case.

ANNA M. HOLCOMBE, Executrix, etc., Appellant, v. KNEELAND J. MUNSON *et al.*, Respondents.

Court of Appeals, November 30, 1886.

Affirming same case, 34 Hun, 636, Mem.

Appeal. Judgment absolute.—Upon an appeal from an order of the general term reversing a judgment entered upon the report of a referee, and directing a new trial, with stipulation for judgment absolute in case of affirmance, the court of appeals will examine the whole record, for the purpose of discovering whether there are any errors committed by the trial court which will authorize an order of reversal by the general term: and if such are found, this court must affirm the order appealed from and order judgment absolute for the respondent.

2. *Same. Reversal on law.*—Where the decision of the general term, in granting an order of reversal of a judgment entered upon the report of a referee, is placed upon questions of law alone, the court of appeals is precluded from reviewing the case upon the facts, and is confined to the examination and decision of the questions of law presented by the record.

3. *Evidence. General Objection.*—Where an objection cannot be obviated by any means within the power of the party offering the evidence, a general objection thereto is sufficient to raise the question of its admissibility.

4. *Same. Parol evidence.*—A written contract cannot be explained, modified or contradicted, either as to its express or implied terms, by parol evidence, whether the proposed parol modification purports to have been made before, at the time of, or after the date of the execution of the instrument; certainly not, where the contract proposed to be proved is required by the statute of frauds to be in writing.

5. *Same. Opinion.*—The opinion of witnesses, who have no knowledge of the location and dimension of a lot of land, other than the statements of a third person, who pointed out a lot to them, as to the number of acres therein, and the number of cords of wood it would produce per acre, unless supplemented by the testimony of the informant that he knew the lot and pointed it out to the witnesses accurately, is merely hearsay evidence and incompetent, and the denial of a motion to strike out the testimony is error.

Appeal from an order of the general term of the supreme court, reversing a judgment entered upon the report of a referee.

James Lansing, for appellant.

Esek Cowen, for respondent.

RUGER, Ch. J.—This action was brought by John F. Holcombe, as assignee of George P. Holcombe, to recover damages from the defendants, for an alleged breach of contract by refusing to employ the assignor in cutting wood and manufacturing charcoal on certain lands owned by them, and also by refusing to accept and pay for certain coal agreed to be furnished by him.

The complaint did not allege performance of the contract by the plaintiff's testator, or even a tender of performance, but claimed damages for its breach occasioned by defendants' refusal to make the advance payment of fifty cents a cord provided to be paid for wood chopped, and by an alleged notification by defendants to plaintiff's testator that they would "not perform the agreement upon their part to be performed, and would not accept any coal made or furnished by him, nor provide cars to transport the same."

The answer admitted the making of an agreement by the defendants, with George P. Holcombe, in the terms and to the effect particularly set out therein (and which accords with the written agreement thereafter produced in evidence by the plaintiff) but denied the making of any other or different contract. It also took issue upon the allegations of the complaint that they had refused to perform or carry out said contract, or had prevented or discharged said Geo. P. Holcombe from performing the same, and avowed their readiness and ability at all times to perform their part of said agreement.

Upon the trial the plaintiff produced in evidence a writ-

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ten contract executed by the parties referred to, reading as follows:

“ Articles of agreement made and entered into this 9th day of March, 1880, between Geo. P. Holcombe, of New Lebanon, N. Y., of the first part, and Munson & Landon, of Chatham Village, N. Y., of the second part as follows: the said Holcombe agreed with said Munson & Landon to take charge of and cut, coal and deliver all the timber to be taken from lots this day purchased from Aaron P. Sackett, Burton Jolls and Bernard Nelan, said wood to be cut and corded with good solid measure, to be burned under earth in a good workmanlike manner, and delivered at the railroad at a point where it can be shipped on board of sealed cars to be furnished by said Munson & Landon; cars to be well filled, and due diligence made to keep the supply of coal without unnecessary delay. For such service said Holcombe shall receive from the Jolls and Nelan jobs, the sum of nine cents per bushel, said Munson & Landon furnishing wood; for the Sackett job, said Holcombe shall receive for his services the sum of ten and one half cents per bushel of coal delivered on the cars. Holcombe shall cut all the wood low and well trimmed. Books of account shall be kept by both parties, subjected to the inspection of both, payments to be made on the 15th day of each month for all coal delivered on the cars the month previous. The parties of the second part agree to advance fifty cents per cord of all wood cut the month previous, which shall be taken from the price paid for the coal. Said Holcombe agrees to make from 40,000 to 75,000 bushels of coal and deliver the same on the cars up to November 15, 1880; said Munson & Landon will pay said Holcombe twelve dollars per hundred for goods, merchantable charcoal, made from hard wood purchased by said Holcombe, the same being delivered on the cars and paid for on the 15th of each month; said Holcombe to complete the Sackett job by the first of November, 1882; the parties of the second part

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to make punctual payments, and to furnish cars promptly, that there may be no delay.

In witness thereof the parties to these presents have hereto set their hands and seals the day and year first mentioned.

GEO. P. HOLCOMBE. [L. s.]

MUNSON & LANDON. [L. s.]

In the presence of H. C. BULL.

The questions mainly litigated upon the trial were: *First*, whether there had been any refusal on the part of the defendants to perform the contract; *second*, whether there had been a subsequent parol alteration of the terms of the written agreement; and, *third*, as to the quantity of coal which the wood on the lot in question was capable of producing, and the cost of manufacturing it.

Upon all of these questions the evidence was quite contradictory and conflicting and incapable of being harmonized or reconciled.

The referee found upon each of the questions referred to in favor of the plaintiff and assessed the damages at \$10,608. From the judgment entered upon the referee's report the defendants appealed to the general term. That court, after an examination of the evidence in the case, came to the conclusion, as appears from its opinion, that the referee erred upon the facts in ordering judgment for the plaintiff. Instead, however, of determining the case upon this ground, its decision was placed, as we must assume from the order of reversal, upon questions of law alone; and it reversed the judgment entered upon the report of the referee and directed a new trial.

The plaintiff declined the hazards of a new trial, but elected to appeal to this court, giving the usual stipulation for judgment absolute.

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The decision of the general term precludes us from reviewing the case upon the facts, and confines us to the examination and decision of the questions of law presented by the record. In view of the repeated warnings given by this court of the hazard incurred by a party in taking such course, of encountering some objections and exceptions taken on the trial, but not considered by the general term which might prove to have been well taken, and especially in a case that bristles with exceptions, it was to say the least quite dangerous to risk the chances of an affirmance by us for such errors. *Copp v. Hatfield*, 46 N. Y. 533; *People v. Supervisors of Essex Co.*, 70 id. 228; *Mackay v. Lewis*, 73 id. 382.

Upon such an appeal it is our duty to examine the whole record, for the purpose of discovering whether there were any errors committed by the trial court which would have authorized an order of reversal by the general term; and if such are found it is the imperative duty of this court to affirm the order appealed from and order judgment absolute for the respondent. *Id.*

We have carefully examined the case for this purpose, and while we find many grave and serious errors committed on the trial which were not at the time pointed out by sufficient and appropriate objections, we also find some that were properly raised and which must be considered and decided by us.

Among the most prominent of them was the admission by the referee, against objection, of parol evidence to add to and modify the written contract. With the view of relieving the last clause of such contract from the objection that it might be void for want of mutuality, the plaintiff sought to give in evidence an alleged conversation had between George P. Holcombe and said Landon on the same day, but after the execution of the written contract. Mrs. Holcombe, who was the first witness called to prove it, was asked the following question: "What, if anything, was

said there as to the amount of coal he wanted your husband to furnish under the twelve cent clause of the contract?"

The question was objected to by the defendants "as immaterial and improper, and as it calls for the conclusion of the witness." The objection was overruled and the defendants excepted.

We are of the opinion that the question was objectionable, and that the grounds of the objection were sufficiently stated to raise the question of its admissibility. The question purported on its face to call for parol evidence qualifying, limiting and affecting the provisions of a written contract. It was plainly intended thereby to give proof of such parol agreement, outside of the written contract, varying or explaining its meaning and effect. Such evidence was both improper and incompetent.

The grounds of the objection could not have been misunderstood, either by the court or the parties; and the objection could not have been obviated so as to make such evidence admissible. The question in terms called for oral proof to supplement the provisions of a written contract, and to the proposition, plainly implied from the question, the defendants objected that such evidence was immaterial and improper, as it unquestionably was.

The object of the rule requiring objections to evidence to be made specific and to point out the precise defect existing therein, is to prevent surprise and enable the party offering it to obviate such difficulties as are merely formal and can be cured by reforming the question, or which by further proof can be removed and the question rendered competent. *People v. Beach*, 87 N. Y. 512; *Bergmann v. Jones*, 94 id. 51. In a case where the objection could not be obviated by any means within the power of the party offering the evidence, in order to raise the question of its admissibility it is sufficient to make a general objection thereto. *Quinby v. Strauss*, 90 N. Y. 664; *Tooley v. Bacon*, 70 id. 34; *Merritt v. Seaman*, 6 id. 168.

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The clause of the contract in question was complete in all its parts and needed no additional evidence to make it plain and intelligible. The plaintiff's assignor was to furnish coal to the defendants at cars furnished by them, and they were to receive all he should deliver, and pay for it at the rate of twelve dollars per hundred bushels on the fifteenth of each month after delivery. The proposed evidence tended to contradict the terms of the contract and limit the quantity deliverable by the vendor to one hundred thousand bushels. The fact that a written contract is unenforceable by reason of some vice expressed in it does not authorize the introduction of parol evidence to eliminate such objection. It is only where the contract is obviously incomplete and imperfect by reason of the absence of some provision which, it is apparent, the parties must have contemplated as a part thereof, that parol evidence may be admitted to supply the defect. This is a salutary and beneficial rule and should neither be disregarded nor evaded.

It is a familiar and fundamental rule of evidence that a written contract cannot be explained, modified or contradicted, either as to its express or implied terms, by parol evidence, and it is immaterial whether the proposed parol modification purported to have been made before, at the time of or after the date of the execution of the instrument. *Mott v. Richtmyer*, 57 N. Y. 50.

The plaintiff made no suggestion that the evidence called for came within any of the exceptions to the rule, and even if he had it would not have availed him anything, for the contract proposed to be proved is required by the statute to be in writing, and it is not competent by parol to add to such a contract any provision whatever. *Drake v. Seaman*, 97 N. Y. 230.

The further objection that the contract proved was void by the statute of frauds as embracing a sale of personal property amounting to more than fifty dollars in value, was not available until after the evidence had disclosed the nature

of the contract, and we think that after that time, within the decision in *Bommer v. Am. Spiral Hinge Mfg. Co.* (81 N. Y. 468), that objection was not properly taken.

That the admission of this evidence constituted a material error is manifest from the fact that the referee awarded damages to the amount of \$2,000 for a breach of this parol agreement.

We are also of the opinion that other evidence was improperly admitted in support of the plaintiff's cause of action. The case was tried upon the theory that the plaintiff was entitled to recover as damages the difference between the cost to him of cutting and manufacturing into coal all of the timber growing upon the several parcels of land described in the contract, and the prices therein provided to be paid for the coal manufactured therefrom. It, therefore, became a very material question on the trial to determine the quantity of wooded land embraced in these lots, the quantity of wood per acre growing thereon and the number of bushels of coal which it was capable of producing. The evidence differed widely upon each of these questions, some witnesses placing the quantity of wood as low as eighteen cords, and others estimating as high as forty cords per acre. Several witnesses who had examined a piece of land pointed out to them as the Jolls lot, were called to testify to the number of acres of wooded land therein contained and the number of cords of wood which in their judgment it would produce per acre. They gave material evidence in the case as to such quantities favorable to the plaintiff's contention. At the same time they testified that they had no knowledge of the location of the Jolls lot or its dimensions, and that their only information in regard to it was derived from statements made to them by a third person. There was no evidence that this person pointed out the Jolls lot accurately, or indeed that he had any knowledge of its location or dimensions, and he was not sworn as a witness upon the trial.

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A motion was made by the defendants to strike out the evidence of these witnesses in respect to the location and estimation of quantities of wood on the lot upon the ground that they had no such knowledge of the facts as entitled them to give an opinion upon those subjects. This motion was denied by the court and the defendant excepted. We see no answer to this exception. The testimony of the witnesses constituted no legal proof of the facts testified to by them, and it should have been stricken out upon the defendants' motion. There was no attempt on the trial to supply by other evidence the manifest insufficiency of this testimony, and no suggestion that it could or would be done. The essential element of knowledge on the part of the witnesses of the facts testified to was wanting and rendered the evidence merely hearsay and incompetent.

We might specify other exceptions which appear to us to be well taken, but those already mentioned are sufficient to show that the order of reversal made by the general term was authorized by manifest errors committed by the referee and require the affirmance of its order for a new trial by this court. We have deemed it unnecessary to refer to the questions discussed in the opinion below, as we have serious doubts as to the sufficiency of the exceptions taken to some of those questions. The order of the general term is, therefore affirmed, and judgment absolute for the defendants ordered.

MILLER and FINCH, JJ., concur; RAPALLO, J., concurs in result; EARL and DANFORTH, JJ., dissent; ANDREWS, J., not voting.

Statement of the Case.

CHARLES SCHWARTZ *et al.*, Appellants, v. WILLIAM K. SOUTTER, *et al.*, Respondents.

Court of Appeals, December 7, 1886.

Affirming same case, 41 Hun, 323; 2 N. Y. St. Rep. 633.

1. *General assignment. Limited partnership.*—An assignment for the benefit of creditors made by the general partners in a limited partnership, containing preferences, is void under the provisions of sections 20, 21, of 1 Revised Statutes, 766.
2. *Same. Subsequent assignment.*—In such case, a subsequent assignment made in compliance with section 1 of chap. 466, Laws of 1877, and without any fraudulent intent in fact, is valid, and conveys the title to the property in case no rights of the partnership creditors have intervened.

Appeal from an order of the general term of the supreme court, reversing a special term order denying a motion to vacate an order for an attachment.

It appears that on September 28, 1885, the defendants, who were general partners in a limited partnership, made a general assignment for the benefit of their creditors containing preferences, which was recorded on the day following. The assent of the assignee was not embraced in or indorsed upon the assignment before the same was recorded, as required by the act of 1877, chapter 466, section 1. Upon the day of the record this omission was discovered and an assent, dated September 28, and acknowledged on the 29th, was separately recorded about an hour and a half after the assignment itself had been recorded. It also appeared that the firm finding itself insolvent sent for its counsel and was by him advised to make an assignment; and acting on his advice they executed one in good faith and without intent to hinder, delay or defraud any of their creditors or the plaintiffs herein, and without being aware

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that such assignment was contrary to law. The assignment contained preferences to two persons to whom the firm was indebted.

It also appeared that before any act was done under the assignment defendants' counsel discovered that the firm of Soutter & Co. instead of being a general partnership was a limited one, and included Timothy H. Porter as special partner; and thereupon, on October 1, 1885, another assignment was duly executed, acknowledged and recorded containing no preferences, which recited the true nature of the partnership and embraced in it the assent of the assignee. Under this last assignment the assignee filed his bond and schedule, treating the former assignment as a nullity. On the 30th of December, or nearly three months after the recording of the last mentioned assignment, the plaintiffs procured a warrant of attachment on an affidavit stating that said firm become insolvent on the 28th day of September, 1885, and that "defendants Soutter and Edwards, with intent to hinder, delay and defraud the creditors of said limited partnership, and of giving a preference to two certain creditors hereinafter named, assigned all the property and assets of said limited partnership," etc. The defendants moved to vacate it, upon the affidavit of the defendant Edwards, the two assignments and the papers upon which the attachment was granted. The motion was denied. From the order of denial defendants appealed to the general term, which reversed the order and granted the motion: "Upon the ground that the assignment of September 28, 1885, was void in law and passed no title to the assignee, because the consent of the assignee was not embraced in, or at the end of, or indorsed upon the assignment before the same was recorded, as required by section 1, chapter 466, Laws 1877. And the subsequent assignment, executed October 1, 1885, and in compliance with the statute, no rights having intervened, was valid, and conveyed the title to the assignee named, of the

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property embraced within it, no evidence existed of any fraudulent intent in fact."

Eugene Smith and John H. Miller, for appellants.

Delos McCurdy, with *Messrs. Vanderpoel, Green & Cumming*, for respondents.

PER CURIAM.—Under the provisions of the Revised Statutes (3 R. S., [7th ed.] 2238, §§ 20, 21), the assignment of September 28, 1885, was void for the reason that it contained preferences. The assignment of October 1, 1885, was therefore valid. Upon this ground the order of the general term should be affirmed.

All concur.

BENJAMIN FITCH, Respondent, v. PATRICK McMAHON,
Appellant.

Court of Appeals, December 17, 1886.

Affirming same case, 41 Hun, 642, Mem; 3 N. Y. St. Rep. 147.

1. *Arrest. Fraud.*—The evidence presented to a judge for an order of arrest under subdivision 1 of section 550 of the Code, though not as full and satisfactory as may be desired, is sufficient, if it is enough to confer jurisdiction to grant the order, on review in the court of appeals. The facts in this case were held sufficient to give the judge jurisdiction.
2. *Same.*—An allegation in a complaint that the defendant "wrongfully took" the chattels for which the action was brought does not necessarily imply a fraudulent taking, and the right to arrest in such case depends upon proof of the extrinsic fact of fraud.

Appeal from an order of the general term of the supreme court, affirming a special term order which denied a motion to vacate an order of arrest.

Wm. J. Gaynor, for appellant.

Abram Kling, for respondent.

PER CURIAM.—The ground of arrest, as stated in the

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order, is that specified in subdivision 1 of section 550 of the Code of Civil Procedure. The affidavits tended to establish that the goods purchased by the defendant from Benjamin Fitch & Co. were obtained by fraud. The affidavit of Fitch shows that between the first of September and the twenty-first of October, 1885, his firm sold to the defendant goods and merchandise of the value and kind alleged in the first cause of action set out in the complaint, upon his representation that he was doing a good business, which the affiant alleges was untrue, "which appears by the affidavits annexed," and to which he refers. It appears by reference to their affidavits that on the thirteenth of November, 1885, twenty-three days after the last sale by Fitch & Co., the defendant made a general assignment to one of his sons, with a fraudulent preference, in favor of a son residing in England, of \$4,220, and that his assets, at the time of his assignment, were \$7,212.25, and his liabilities about \$14,308.17. It is a reasonable inference from these facts that the defendant's representations to Fitch & Co. that he was doing a good business, upon the faith of which Fitch & Co. sold the goods, were false.

The fraud in the purchase of the goods justified the further inference that the inability of the sheriff to find the goods, and take them on the requisition, was in consequence of a fraudulent disposition or concealment of the goods by the defendant, in pursuance of his original fraud, with intent that they should not be taken, and to deprive the true owner of the benefit thereof. *Barnett v. Selling*, 70 N. Y. 492.

The affidavits presented a case justifying the judge granting the order in deciding that a cause of arrest, under subdivision 1, section 550, was made out. The evidence presented to the judge was not as full and satisfactory as might be desired, but there was enough to confer jurisdiction to grant the order. We assent to the contention of the defendant's attorney that the allegation in the com-

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plaint, that the defendant "wrongfully took" the chattels for which the action was brought, did not necessarily imply a fraudulent taking, and that the right to arrest depended upon an extrinsic fact to be shown. But we think the requisite extrinsic fact was shown, or, at least, there was evidence tending to show it, which gave the judge jurisdiction.

The order should be affirmed.

All concur.

SAMUEL D. HINMAN, Respondent, v. WILLIAM H. HARE,
Appellant.

Court of Appeals, January 18, 1887.

Reversing same case, 33 Hun, 660.

1. *Evidence. General objection.*—Where a question and an answer cover both facts that are competent and material, and those that are incompetent and immaterial, both are improper. A question must be wholly competent and material, or it must be excluded. When a party assumes to prove in bulk a large group of facts, he must be sure that they are all competent; and it is no answer to an objection made to such a question that some of the facts are competent. Nor is it the duty of the defendant, especially in the absence of any request by the court or the opposing counsel, to grope through the great mass of facts, and point out such as are particularly objectionable. Where the evidence as a whole is in its very nature essentially objectionable, a general objection is sufficient.
2. *Same. When immaterial.*—Evidence that the prosecutor appointed by the defendant, on the trial instituted in the ecclesiastical court, who from his being a communicant of the church must be assumed to be canonically qualified to act in such capacity, was, while in state of gross intoxication kept over night by defendant, and remained in his company the next day, and was thereafter continued by him as prosecutor in said proceeding, is wholly im-

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material, and its sole effect is to disparage and defame the defendant and prejudice him in the minds of the jury.

3. *Same. Incompetent.*—Where nothing had been said about a certain loan in either of the pamphlets issued by the parties, and there was no allegation about it in the pleadings, but a witness whose deposition had been taken *de bene esse*, spoke incidently, as a reason for his remembrance of another fact, that he was so much shocked about "this loan of \$500," testimony that said amount had been previously paid, is incompetent, not within the issue, probably harmful to defendant and should not have been received.
4. *Same. Impeachment of person not a witness.*—The allowance of evidence as to the bad reputation, for truth and veracity, of a person in the community where she resided, upon whose statements defendant had based certain charges against plaintiff, was erroneous, on the ground that defendant should not have been deprived of the benefit of the information thus received upon which he in part relied and acted, by such a general impeachment of the character of the person, not a witness, from whom the information emanated.
5. *Same. Opinion.*—Where the sole issue was whether the defendant had knowledge of the rumors affecting plaintiff's character for purity, and had received such information that he could, in good faith, and without actual malice, print the pamphlet in which it was charged that the plaintiff's reputation was infamous in the Indian Country, and that he was impure and unchaste with Indian women, the opinion of a witness that plaintiff was innocent of previous immoralities which the witness had long before investigated, was not competent, and was well calculated to prejudice the case of the defendant.
6. *Same. Explanation.*—The defendant, in an action for libel, is entitled to show the circumstances which provoked a disparaging remark made by him concerning plaintiff, and under which it was made, and that the remark was not made maliciously, but while burning with indignation, and shocked by what he had just heard in reference to the conduct of plaintiff.
7. *Same. Refute malice.*—Where defendant, in his pamphlet upon certain portions of which the action for libel was founded, has made statements affecting plaintiff's conduct in pecuniary matters, and plaintiff has been allowed to testify that they are false, it is competent for defendant, upon the issue of good faith and malice, to show upon what evidence his statements were based.

Appeal from a judgment of the general term of the

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supreme court, affirming a judgment entered upon a verdict in favor of plaintiff in an action for libel.

Steven P. Nash and Samuel Hand, for appellants.

William Henry Arnoux and Haley Fiske, for respondents.

EARL, J.—This is an action of libel, in which the plaintiff, a clergyman, recovered against the defendant, his bishop, a verdict of \$10,000. From 1873 to the commencement of this action the defendant was missionary bishop of the Protestant Episcopal Church for Niobrara, a jurisdiction over a district of country chiefly settled by Indians, located in the state of Nebraska and the territory of Dakota, and the plaintiff, during a portion of the same time, was a missionary presbyter in the same jurisdiction, and as such was under the charge of the bishop, and subject to removal by him. On the twenty-fifth day of March 1878, the defendant addressed to the plaintiff a letter signed by him as bishop, of which the following is a copy :

“MY DEAR BROTHER: I address you by this title, and acknowledge the obligation, which its use involves, even while I perform the painful duty of writing to say that your persistent disregard of your pecuniary obligations, and your evil report in this neighborhood, render your continuance in the Niobrara mission hurtful to it. I have therefore not appointed you a missionary for this year, and have so notified the Indian committee, and your connection with the mission will end this day. Your stipend for this month has been deposited with Messrs. Weare & Allison. I am authorized by the committee to continue your salary for a short time, if equity should demand such a course. With the severance of your connection with the mission ceases, of course, your right to the use of any of the buildings, the title of which vests in the Indian committee. I take this action only from a sense of duty, and with the most painful reluctance.”

On the eleventh day of April thereafter the plaintiff demanded of the defendant letters dimissory to the diocese of Nebraska, and, in case of refusal of such letters, an immediate trial before an ecclesiastical tribunal organized under

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the canons of the church. The defendant immediately organized a court, and that was, after entering upon the trial, dissolved, and then another was constituted, which also entered upon the trial, and finally adjourned *sine die*, without reaching any conclusion. These courts were attended with some difficulties, embarrassments, and objections, which rendered them abortive.

The failure of these trials was charged by the plaintiff to the conduct of the defendant, and by the defendant to the conduct of the plaintiff. After their failure on the seventeenth day of February, 1879, the plaintiff composed and addressed a letter to the general secretary of the board of managers of the Domestic & Foreign Missionary Society, which was afterward printed in pamphlet form, and a copy thereof was sent to all the members of the missionary society, which included all the bishops of the Episcopal Church and others. That pamphlet covers about 30 pages of the printed record, and in it the plaintiff set forth in great detail his relations with the defendant, and made a most vehement, eloquent, and forcible statement of the wrongs which he claimed to have suffered from the defendant. He accused the defendant of taking every occasion to insult and humble him, and to abuse and browbeat every Indian who dared to lift up his voice in his favor, of treating with kindness every one who was found willing to turn against him, and of openly rejoicing at any information or suspicion that he could turn to his discredit. He characterized his conduct as unlawful, insincere, unfair, unjust, uncanonical, cowardly, unmanly, dishonest, outrageous, remarkable, shameful, passionate, subtle, unscriptural, indefensible, monstrous, unrighteous, highhanded, atrocious, heartless, and cruel.

On the twenty-second day of July, 1879, the defendant composed and caused to be printed, also in the form of a pamphlet, a reply to the plaintiff's pamphlet, which contained the matter charged in the complaint to be libelous. It was marked "Private," and sent to the bishops and other mem-

bers of the missionary society, and to a few other persons especially interested in the missionary work among the Indians. In it he charged the plaintiff with misconduct in reference to his pecuniary obligations and other financial matters, and with various acts of gross impurity and adultery. Subsequently, in February, 1880, finding the defendant in the city of New York, the plaintiff began this action by service of process there. In his complaint he does not complain of any of the charges made against him in reference to his financial transactions and pecuniary obligations, but bases his action solely upon the charges of impurity and adultery. In his answer the defendant admits that he composed the pamphlet containing the alleged libel, and alleges that his action in reference to the matters stated was official and based upon the evil reputation of the plaintiff; that it was written in reply to the previous pamphlet composed and circulated by the plaintiff, and to protect his personal and official character from the attacks of the plaintiff, and not otherwise; that his action in the matter was made, necessary by his sense of duty to the church of which he was a bishop, and to the missionary board under whose authority he was acting, and was without malice, and, therefore, privileged; that he would prove, in mitigation of damages, the existence of the rumors and reports stated in the extracts from the pamphlet which were set out in the complaint and that there was reasonable and probable ground for his believing the information, rumors and reports therein referred to, and for expressing the conviction of the truth of them therein expressed.

Upon the trial the judge held that the pamphlet complained of was so far privileged, that the plaintiff, to maintain his action, was bound to show that the defendant was guilty of bad faith, and actual malice in the publication thereof, and whether he was or not, was the only substantial issue of fact to be tried.

The trial took place more than a thousand miles distant

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from the country where all the matters to be investigated occurred, and where the evidence relating to them was to be found, in a community where the value of the Indian, and other evidence, and the significance of the facts could not be as well appreciated as they could have been by a jury of the vicinage. The nature of the case was such that the prejudices, passions and sympathies of the jurors could easily be aroused and their judgment warped, and hence the rules of evidence should have been strictly observed and enforced; and it is quite difficult, if not impossible, to say what influence prejudicial to the defendant, any illegal, incompetent or immaterial evidence may have had. A careful study of the whole case led us to the conclusion that the defendant was or may have been prejudiced by the reception against his objection, of evidence which we believe to have been incompetent, and by the exclusion of evidence offered by him which should have been received.

1. Upon the trial the defendant put in evidence the plaintiff's pamphlet of February 17, 1879, for the purpose of showing the provocation and occasion of the publication made by him, alleged to be libelous, and the trial judge held that it was competent for that purpose, but not as evidence of the facts therein stated. Subsequently while the plaintiff was giving evidence as a witness on his own behalf, being shown the pamphlet, he was asked: "Are the facts stated in that paper—those that are stated upon your personal knowledge—true?" The defendant's objection to this question was overruled, and he answered, "they are." In this ruling we think there was error. As no ground of objection was specified, the defendant is not now in a position to claim that the plaintiff was permitted to verify in bulk the multitudinous facts contained in the pamphlet. Nearly all the facts alleged therein were stated positively, and it must have been utterly impossible for the jury to discriminate between facts stated upon personal knowledge, and those which were stated as mere matters of opinion and belief, and upon this ground

too, the question was objectionable, but probably this ground also ought to have been specified. But the pamphlet contained some allegations of fact which were incompetent, some which were wholly immaterial and irrelevant to the issue, and some which, from their nature, the plaintiff would have been incompetent to prove, if he had been particularly questioned in reference thereto. A few specimens will be given: "The facts are that the Indians who are my friends were all attending church regularly, and the idea of throwing away their religion had never entered their heads, but because they were indignant and sorrowful at the course pursued by their bishop, they would only for special reasons go to the Central Church at the agency when the new missionary was installed." Speaking of a letter addressed to the Christians of the Santee people by Bishop Clarkson, alleged to have been written at the request of the defendant, the pamphlet states: "So this letter had no effect upon the Indians, except to make them wonder how so good a man could have been led to do blindly so unjust an act. This bishop has since told me he was sorry for it, and that he wrote the letter with great reluctance and hesitation, and acknowledged that it was an unfair interference with a presbyter who had asked for a hearing, and only asks what it appears is by no means to be granted to him." Speaking of the person who was appointed prosecutor upon one of the attempted trials of the plaintiff, it characterizes him thus: "He is a discharged soldier of bad record, an adventurer who has for a long time led a dissolute life and is habitually profane, and he has in no manner mended his ways since being employed by the bishop, who still retains him though his frequent dissipations have been reported, and who admits him at all times to the mission house which I am already adjudged unworthy to enter." Speaking of one of the attempted trials it states. "The case was by him withdrawn in a cowardly and unmanly way, for the only reason that it had become evident from the worthlessness of his testimony

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that the defendant must be acquitted." It is also stated as follows: "He said to the Indian catechist that it would be very bad for him if I was acquitted." He (the defendant) said he had only resorted to this subterfuge to gain a few months' time until the fall of the year, that the whole country might be ransacked if haply they might discover testimony that would convict me. As a member of the court forcibly expressed it, "the bishop let go, to try and get a better hold." It is also stated that, at a convention of the clergy called by the bishop within his jurisdiction, the case between the defendant and the plaintiff was skilfully laid before them in detail, for the purpose of procuring an opinion favorable to his action already taken, and that the convocation was procured to adopt a resolution reciting that, under the circumstances, a presentment against the plaintiff was justifiable; that, at the same time, a resolution of love and sympathy for the plaintiff was adopted, and that the defendant severed the former resolution from the latter, and caused it to be printed and sent to the secretary of the Indian commission for general distribution, and then it is stated, "When this became known, the clergy were indignant, and three of them, to my knowledge, protested against it as an outrage;" and then the pamphlet contains abstracts from the letters severally written by the three clergymen. And then it is further stated: "I have given only a small part of the abundant testimony at hand as evidence of the irregularity, passion, and subtlety which has characterized all these extraordinary and indefensible proceedings."

We have now gone far enough to show that there was much matter in plaintiff's pamphlet which was wholly incompetent and irrelevant upon the trial of this action. So far as the facts contained in the pamphlet of which the plaintiff had personal knowledge, and in reference to which he was competent to testify, bore upon the issue of malice and bad faith, they were competent evidence; and, if the inquiry had been exclusively confined to them, the defendant

would have had no reason now to complain. But the question and the answer covered both facts that were competent and material, and those that were incompetent and immaterial, and hence both were improper. A question must be wholly competent and material, or it must be excluded. When a party assumes to prove in bulk such a large group of facts, he must be sure that they are all competent; and it is no answer to an objection made to such a question that some of the facts were competent. It was not the duty of the defendant, particularly in the absence of any request by the court or the opposing counsel, to grope through the great mass of facts, and point out such as were particularly objectionable. As the evidence as a whole was in its very nature essentially objectionable, a general objection was sufficient.

2. At the first meeting of the ecclesiastical court, organized for the trial of plaintiff, he had objected to the appearance of the defendant against him as a prosecutor, and his objection was sustained by the court. The defendant then designated one Fox, an attorney residing within his jurisdiction, as prosecutor, and he appeared before the court in that capacity. He was the same person charged in plaintiff's pamphlet as being a disreputable character. He claimed to be a communicant of the church, and in the absence of proof to the contrary it must be assumed that he was, and that he was thus canonically qualified to act as prosecutor.

While the plaintiff upon the trial was giving evidence as a witness on his own behalf, and after he had testified to the appearance of Fox as prosecutor, he was asked by his own counsel this question: "Do you know whether this man Fox was an associate of Bishop Hare at his house?" This was objected to on behalf of the defendant, and the objection was overruled, and the plaintiff answered: "He was; I know upon one occasion of his going there in a state of gross intoxication, and of Bishop Hare keeping him over night and then being in his company the next day. After that

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the bishop continued him as the prosecutor in the proceeding that he instituted against me." This evidence was wholly immaterial, and its sole effect was to disparage and defame the defendant and prejudice him in the minds of the jury.

3. Upon the trial the plaintiff read from a deposition of Bishop Whipple taken *de bene esse*, and the defendant's counsel read from the same deposition by way of cross-examination, evidence in which he spoke of meeting the defendant in Boston, and he gave as a reason for remembering that the defendant began the conversation there had about the plaintiff, that he was so much shocked about "this loan of \$500." He did not state what loan was referred to nor what the defendant said upon the subject. He was not inquired of nor examined as to the loan, but what he said about it came out incidentally as a reason for his impression or remembrance of another fact. Nothing had been said about this loan in either of the pamphlets, and there was no allegation about it in the pleadings. Subsequently, while the plaintiff was being examined as a witness on his own behalf, his counsel asked him this question: "He stated something to Bishop Whipple about a \$500 note, which shocked the bishop very much. Will you state whether that note at the time of this conversation with him was paid?" This was objected to on behalf of the defendant as not being contained in the pamphlet, but as being drawn out by the examination of Bishop Whipple. The objection was overruled and the witness answered: "I paid that note and Bishop Hare had the money in his possession at the time with 10 per cent interest on it."

This evidence was incompetent, not within the issue, and probably harmful to the defendant and should not have been received.

4. In the year 1877, a female teacher in one of the schools under the defendant's charge stated to him that an Indian girl, Cecelia Benoist, a pupil teacher in the school, had made known to her the fact that the plaintiff had brought to her

a pair of pantaloons to be mended, and as she was looking at them said to her: "Cecie, I love you very much; won't you walk with me to-night? I want to talk with you," and that Cecelia's modesty was very much offended by his manner; and upon this information the defendant in part relied in making the charge in his pamphlet that the plaintiff had tampered with school girls. Upon the trial plaintiff's counsel asked one of the witnesses, a clergyman, who resided within the defendant's jurisdiction, and who had testified that he knew Cecelia Benoist there, this question: "Do you know what was her reputation for truth and veracity in that community?" The defendant's objection to the question was overruled, and the witness answered that it was "not good; that it was bad." It does not appear that the defendant knew that her reputation was bad, and it cannot be assumed that he knew it. She appears to have been a subordinate teacher in the school and her story is so far relied upon by the principal of the school that she related it to the defendant. He should not have been deprived of the benefit of the information thus received upon which he in part relied and acted by such a general impeachment of the character of the person, not a witness, from whom the information emanated.

5. Upon the trial of this action the defendant's counsel read from the deposition of Bishop Whipple, in which he testified that the plaintiff came under his jurisdiction as a missionary among the Indians prior to 1865, and that in that year he had rumors prejudicial to his character for chastity; that he appointed a commission to investigate the rumors, and that the commission made the investigation, and made a report exculpating the plaintiff. He was not asked on behalf of the defendant for his opinion as to the guilt or innocence of the plaintiff, and expressed no opinion on that subject, and he testified to no facts showing or tending to show that he had any ill will toward the plaintiff, or that he had any belief in or connection with the alleged libelous charges made by the defendant against the plaintiff. The

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plaintiff read from the cross-examination of the bishop, in which he was asked this question: "From the examination that you yourself made of the evidence in regard to those charges, in 1865, did you form any conclusion in your own mind as to the innocence or guilt of Mr. Hinman?" The objection on behalf of the defendant was overruled, and the witness answered, "That he was innocent absolutely." There was nothing in the previous examination of the bishop on behalf of the defendant that made his evidence competent. The defendant had no part in the examination of the plaintiff's conduct, instituted in 1865, and was in no way concluded thereby. Rumors affecting the plaintiff's character for purity again became rife in the Indian country within the defendant's jurisdiction, in the fall of 1873, and the defendant conceiving it to be his duty to investigate them, associated with himself the bishops of Minnesota and Nebraska, and such an investigation as could be made resulted in the plaintiff's exculpation. Some years thereafter similar rumors again became rife in the Indian country, which led up to the charges made by the defendant upon which this action is based. The continuance of these rumors affecting the plaintiff's character during so many years, may have led the defendant in good faith to doubt the accuracy of the conclusions reached in the former investigations, and in 1879, when he wrote his pamphlet, he had the right, in weighing the facts and the information which came to him, to take into account the plaintiff's whole life among the Indians, and his standing and reputation in the Indian country. From all the information he had in 1879 he was not bound to believe that the rumors affecting the plaintiff's character in 1865, and in 1873, were unfounded. It was, therefore, prejudicial to him to throw into the scale against him the absolute opinion of a most distinguished prelate that the plaintiff was innocent in 1865. It was not one of the issues that was to be tried whether the plaintiff was actually guilty or innocent at any of the times mentioned. But the sole issue was whether the

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defendant had knowledge of such fact, and had received such information that he could, in good faith, and without actual malice, print the pamphlet in which it was charged that the plaintiff's reputation was infamous in the Indian country, and that he was impure and unchaste with Indian women, and upon that issue the opinion of Bishop Whipple was not competent, and was well calculated to prejudice the case of the defendant.

6. We are also of opinion that some evidence, to which the defendant was entitled upon the trial, was improperly excluded. In the plaintiff's pamphlet he stated that when Miss West, a female friend of his, elected to leave the mission and take up her lot with him, the defendant told her he was "sorry she had any connection with such a beast." The defendant, while giving his evidence on his own behalf, was asked this question: "Now I want to ask you whether anything, and if so what had occurred immediately prior to meeting Miss West, which led you to use the expression which before recess you said you used, in plaintiff's pamphlet, 'sorry that she had any connection with such a beast,' or, as you stated, 'sorry that she had cast in her lot with such a beast?'" and he answered: "I had just heard of a shocking act of Mr. Hinman in connection with one of the girls of my school." Upon motion of plaintiff's counsel this answer was stricken out. We think the defendant was entitled to the answer. It appeared that the defendant had made this disparaging remark of the plaintiff, and he was entitled to show the circumstances which provoked it and under which it was made, and that the remark was not made maliciously, but while burning with indignation, and shocked by what he had just heard in reference to the conduct of the plaintiff.

The defendant's pamphlet contained charges against the plaintiff affecting his conduct in pecuniary matters, although in the plaintiff's complaint no mention was made of that portion of the pamphlet, yet upon the trial, upon the question

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of defendant's malice, the plaintiff was permitted, against the objection of the defendant, to give explanatory or exculpatory evidence in reference to those matters, denying them. But when the defendant was giving evidence on his own behalf, the judge refused, upon the offer of his counsel, to allow him to state what evidence he had before him for making those statements, and in this there was error. It appearing that the defendant had made these statements, and the plaintiff having testified that they were false, it was competent, upon the issue of good faith and malice, to show upon what evidence his statements were based.

There were upon the trial other rulings of the judge in the admission and rejection of evidence which were dangerously near to error, if not actually erroneous; but the errors we have particularly pointed out constrain us to believe that the ends of justice require that this judgment should be reversed.

The difficulties and embarrassments attending the trial of this action in the city of New York are such, and consequences of any conclusion so serious to one or the other party, that we may, with propriety, venture to say that the welfare of the missions among the Indians, and that the cause of religion, to which both parties are especially dedicated, would be best promoted if this case, in the spirit of forbearance and charity divinely taught, could be taken out of court, and left to the wise and judicious arbitrament of mutual friends.

The judgment should be reversed, and a new trial granted.

RUGER, C. J., concurs; RAPALLO and ANDREWS, JJ., concur in result.

DANFORTH, J., (Dissenting.)—The complaint alleged that the plaintiff was a clergyman, and for 20 years then last past had been a presbyter of the Protestant Episcopal Church in America, of the rank of priest in good standing; that

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for 17 years before March, 1878, he had been a missionary of the church to the Santee tribe of Dakota Indians, in Nebraska and Dakota, and at the times embraced in the complaint, was under the ecclesiastical jurisdiction of the defendant, then missionary bishop of Niobrara; that the defendant on the twenty-second of July, 1879, "maliciously composed and published a printed pamphlet, signed by himself, which he entitled, "The Rehearsal of Facts," and caused to be circulated among the bishops and clergy of said church and elsewhere, and which was therein expressed to be done on his own responsibility, and which contained the false and defamatory matter following concerning plaintiff, who is therein mentioned as Mr. Hinman, to-wit:

"In regard to the second cause of Mr. Hinman's removal, I make the following narrative of events: Reports having continually been brought to my attention, which reflected painfully upon his purity of character, in the summer of 1877, I called to me the Rev. Dan. Hemana, a discreet native presbyter under Mr. Hinman's care, and repeating to him some of the charges of impurity made against Mr. Hinman, I asked him what he thought of them. He was reluctant to express himself, but at last replied: "I have never seen anything; but the Christian people among the Santees believe the reports to be true, and we wish we had another minister." This opinion of Mr. Hinman was and is shared by the other Santee presbyter, Rev. L. O. Walker, and by the Santee deacon, Rev. Amos Ross.

"At the general convention of 1877 Bishop Whipple remarked to me that stories were again afloat reflecting upon Mr. Hinman's character for purity, and that Mr. Hinman must be, to say the least, a very imprudent man. A few weeks later, in Philadelphia, Mr. William Welsh came to me and reported that a gentleman had said to him that it had come to him very directly that Mr. Hinman was regarded in the Indian country as a man of abandoned character, and that it was believed that his wife died of syphilitic disease contracted from her husband. On my return to Niobrara an Indian inspector told me that Mr. Hinman's adulteries were the common talk wherever he went. On my repeating this to the Rev. J. G. Gasman, a presbyter of Niobrara, he replied that there was no doubt that this was the case. Some weeks later the house-mother of one of my boarding-schools reported to me that Mr. Hinman, while visiting her school, had scandalized her older girls by beckoning to them in a suspicious way from his window in the twilight, and that he had abashed a pretty half-breed young

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woman, her assistant, by saying to her, '—, I love you. Won't you walk with me to-night; I want to talk with you.'

"On my return to Yankton agency, some weeks later, the Santee candidates for the ministry, three in number, united in a letter, in which they requested that I would appoint some one, other than Mr. Hinman, their, Bible teacher. Later, they informed me that shameless acts were laid at Mr. Hinman's door; that they were generally believed to have been perpetrated; and that the Santee church people were ashamed and discouraged. They sent to me, at my request, a young man, a communicant of the church, whom they represented as a quiet and worthy man, who told me that he had discovered Mr Hinman lying with an Indian woman. A little later, in December, 1877, a lady, a communicant long known to me, and for years occupying a place of trust under the same roof with him, sought me in great distress of mind, and confessed to me that Mr. Hinman, under promise of marriage, had seduced her. At my request she put this in writing and swore to it.

"In January or February, 1878, the commissioner of Indian affairs in his office told me that there was a clergyman connected with my mission who was a man of most immoral character, who was bringing great disgrace upon it. In reply to my inquiries, he said that it was Mr. Hinman; that he was a known adulterer; that he had been seen in a brothel in Washington; and that he ought to be gotten out of the Indian country, as a man whose presence was detrimental to the welfare of the Indians.

"I state, in addition to the above, that one lady helper reported to me that parents, when she asked them to send their girls to the Santee boarding-school, refused, on the ground that girls sent there were tampered with by the missionary; that another lady, who has been in the mission for seven years, put in my hand a written statement, in which she declared, among other things, that, on going suddenly upstairs in Mr. Hinman's house, she saw him emerge from the servant's room, where he had been with the door shut; that he slunk away covered with embarrassment, and that, on going into the servant's room, she found her flushed and in a tremor; that I have the statement of another lady, who has been eight years in the mission, that Mr. Hinman, on one occasion, to her great alarm, seized her firmly around the waist, and, though she struggled to get free, kissed her several times, and refused to let her go; that the wife of one of the native ministers states that, when she was a pupil in St. Mary's School, Mr. Hinman stroked her cheek, and kissed her, and that she told him she would tell Sister Mary, (her teacher); and a written statement of a white clergyman of the mission, reluctantly given because of his

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friendship for Mr. Hinman, that Mr. Hinman was intoxicated in his presence. * * *

"Notwithstanding my personal conviction of the truth of the charges of impurity made against Mr. Hinman, my official action has been grounded entirely on his reputation. Of that there is no doubt. His name is a byword, his reputation infamous * * *

"I could not tolerate his presence under the same roof with my girls' school."

The answer contains no general denial, nor any denial of the state or condition of the parties, nor the professional engagements of the plaintiff, admits that the defendant composed the substance of the pamphlet, part of which he says is set out in the complaint, and signed the same; that before doing so and on the 25th of March, 1878, he terminated the connection of the plaintiff with the Niobrara Mission, and communicated his action by a letter addressed and delivered to the plaintiff, containing these words:

"Santee, March 25, 1878.

My Dear Brother: I address you by this title, and acknowledge the obligation which its use involves, even while I perform the painful duty of writing to say that your persistent disregard of your pecuniary obligations, and your evil report in this neighborhood, render your continuance in the Niobrara Mission hurtful to it. I have, therefore, not appointed you a missionary for this year, and have so notified the Indian committee; and your connection with the mission will end this day;" that thereupon the plaintiff demanded letters dismissory, or a trial according to the regulations and canons of the Episcopal Church, for the trial of clergymen; and the defendant refusing the letters, proceedings were taken for a trial, but it fell through; a new court subsequently appointed, failed to convene; and thereupon, on the 11th of March, 1879, the plaintiff appealed to the board of managers of the domestic and foreign missionary society of said church, in a statement detailing his grievances, and making false, defamatory and calumnious charges in respect to this defendant's action.

This statement, preceded by a preface, signed by the plaintiff and dated May 26, 1879, in which he mentioned the refusal of said board of managers to entertain his appeal, and then added: "What further can the complainant do but tell it to the church?" was printed in pamphlet form, and as defendant is informed and believes, widely circulated by the plaintiff; that the paper described as "The Rehearsal of Facts" was in reply to that statement and the same was written without malice, for the information of the board of managers of said missionary society, and for whom alone it was intended, without malice and under circumstances which constituted the same a privileged communication.

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The answer, however, admits that the pamphlet was sent by the defendant not only to the managers of the missionary board, but "to several other persons, not more than eight in all, who took an interest in the mission work, which (as the answer states) was imperiled by the conduct of the plaintiff."

The truth of the matter is not averred, nor is justification set up, but as a separate answer the defendant alleges that he will prove in mitigation of damages the existence of the rumors and reports stated in the extracts from defendant's pamphlet, which are set out in the complaint, as they are therein stated, and there was reasonable and probable ground for the defendant's believing the information, rumors and reports therein referred to, and expressing the conviction of the truth of them therein expressed. Upon trial before a jury the plaintiff had a verdict. A motion for a new trial was denied, and after judgment it was affirmed by the general term. The defendant now appeals to this court.

Whether the writing described in the complaint was "maliciously composed and published," was by the pleadings made a material question, and the burden of establishing it was upon the plaintiff.

To write of another that he was "of abandoned character;" that "his wife died of syphilitic disease contracted from her husband;" that "his adulteries were of common talk in certain localities;" and being a clergyman and missionary among the Indians, to write also that "he ought to be gotten out of the Indian country, as a man whose presence is detrimental to their welfare," was enough, upon the face of the paper and proof of publication, to entitle the aggrieved party to his action.

The law implies malice from such a transaction. Those facts and others not less serious appeared here, and the case was tried upon that theory. When the plaintiff rested, the defendant moved for a nonsuit, upon the sole ground that there was not sufficient evidence of publication to put him upon his defense. Except for that, it was conceded by implication, therefore, that the plaintiff's case was made out. Nor is any doubt now suggested by the appellant that publication was well proven, nor as to the correctness of the decision which denied the motion then made.

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The defendant afterward opened his side and gave evidence in support of the answer which alleged that the pamphlet was privileged, and composed and published without malice, and rested.

The plaintiff in reply gave evidence, among others things, of the acts and words of the defendant, relevant to the case thus made, and which tended to show that the charges against the plaintiff were false in fact, and not made by the defendant in good faith, or under circumstances from which he might reasonably believe them to be true, or in the belief at the time that they were true, and rested.

The learned counsel for the defendant again moved to dismiss the complaint upon the ground that no proof of malice has been given in reference to this publication, sufficient to carry it to the jury. The motion was denied, and the defendant excepted.

It may be assumed, although the fact does not appear, that the motion was argued upon the assumption by the defendant that the communication was privileged. If that was so, it was because it was a reply to a previous statement of the plaintiff, or because there was evidence of such relation between the defendant as bishop, and the board of missions, as relieved him of the character of a volunteer, and such relation between the plaintiff and board of missions as gave them an interest in the plaintiff and a knowledge of his true character, and made the information, therefore, such as as they had a right to expect, concerning the conduct and character of one acting as their agent, or at least by their authority and sanction.

Both aspects are presented by the answer. But the defendant would nevertheless be liable if the untrue statements were in excess of what the occasion required, or if there were any want of good faith in making the communication, or in its publication; and those questions were exclusively for the jury. The contention of the defendant is not that there was no evidence of malice, but that it was not sufficient

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to carry the question to the jury. When the plaintiff rested the first time, he had abundantly established malice in law. It appeared upon the face of the paper that the charges were injurious, and in the absence of reasonable excuse for making them, malice was to be inferred.

Upon the defendant's evidence in explanation something more, in our view of the case, might be required from the plaintiff. So far as the communication was privileged, the law ceased to infer malice from the mere falsity of the charge, and other proof of its existence was required; for, as is held in *Lewis v. Chapman*, 16 N. Y. 369, the term "privileged" simply means that the circumstances under which an alleged libelous communication was made, were such as to repel the legal inference of malice and throw upon the plaintiff the burden of proving it by extrinsic evidence. The issue to be determined remained the same, its character was not changed. The question is the same: Was the paper maliciously composed and published?

We have more than once held that it is for the court to determine whether the subject matter to which the alleged libel relates, the interest of the author in it, or his relations to it, are such as to furnish an excuse, but that the question of good faith, or belief in the truth of the statement, and the existence of actual malice, remains for the jury; *Klinck v. Colby*, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 116; and is to be determined by them, either from direct proof, or as an inference from other proof, or even from the libel itself. If the communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice. *Hamilton v. Eno*, *supra*. So, the matter set forth in the libel, though under other circumstances justifiable, may embrace statements so unnecessary for the occasion to which it is applied, as to form strong evidence of malice upon the issue of whether the communication is covered by the privilege, and whether the writer has fairly and properly conducted himself in the exercise of it, and an inference of

actual malice may be drawn from its use. So, there was evidence on which it might be said that some of the statements were false, to the defendant's own knowledge, and of others that they were not believed by him; and it is only where there is no intrinsic or extrinsic evidence of malice that the court can direct a nonsuit. From each of those surces, even at this stage of the case, enough had appeared to require the intervention of a jury. But both sides, after the denial of the motion, gave much additional evidence directed to this very question, and it is therefore unnecessary to say more as to how the matter stood when the motion to dismiss was in fact made. At the close of the case it was not renewed. It is enough that there were questions arising upon the evidence which could be answered only by a jury.

The appellant contends, however, that the plaintiff's evidence to show malice was allowed to take too wide a range. The question is, what was material under all the circumstances of the case? For, if any fact failed to support the issues it was irrelevant, whether it was near or remote in point of time. No different ruling was made by the trial judge. The objections upon which the point is placed were two: (1) To the relevancy of any evidence anterior to the publication of the pamphlet alleged to be libelous; and (2) to anything back of 1878. The objections were both made while evidence was going on as to transactions between the parties. No other ground was stated than is above mentioned; and there is no suggestion that the events then under examination had not at least an apparent connection with the one in issue, or that they might not tend to show the knowledge, spirit, and intention of the defendant in publishing the libel charged. If they did, no time would be too remote, and the plaintiff could not be deprived of them by any arbitrary limitation; and whether they did or not was no part of the inquiry called for by the objection.

There were other exceptions. While the plaintiff had

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the case, in reply to the defendant, the plaintiff's counsel offered to read in evidence, from the canons of the church, title 2, canons 1 and 2, on pages 94, 95, and 96 of the Appendix of the Journal of the General Convention of the year 1877, whereupon defendant's counsel objected to the admissibility of the testimony. The objection overruled, and defendant's counsel excepted. The defendant's counsel had already offered and read in evidence, from the same book as produced in the same journal, articles 5 and 6 of canon 9; and as it cannot be said that, under no circumstances, could such other regulations be competent, in the absence of some specific objection, no error is apparent in allowing the plaintiff to read such additional portions as he might desire.

The defendant's counsel had offered and had read in evidence a paper, called a "Statement of Samuel D. Hinman;" and, that person being on the stand, it was shown to him, and he was asked by plaintiff's counsel, "Are the facts stated in that paper—those that are stated upon your personal knowledge—true?" Then follow these words: "Objected to; objection overruled; defendant excepts." Such an objection raises no question. The paper was already in evidence by the act of the defendant. Was the objection aimed at the form of the question? It might have been modified. The competency of the witness was not questioned, nor the materiality of the facts stated. Whether general evidence should be given of them, or each fact taken separately, would, in any event, be in the discretion of the judge; and, where no specific objection is made to the course proposed, it cannot be first started on appeal.

So, of the next exception. It appeared that the defendant on one occasion proposed to conduct the prosecution of the plaintiff before an ecclesiastical court, and, upon objection made, the court refused to allow him to do so, and at the adjourned day one Fox, an attorney, appeared in his place. The plaintiff's counsel then asked this question:

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"Do you know whether this man Fox was an associate of Bishop Hare at his house?" Objected to by defendant, and, it being admitted, he excepted. The importance of the question is not obvious, nor is its incompetency. In the face of only a general objection, there was no error in permitting it.

But even now, in view of the discussion by the learned counsel for the appellant, we do not see that any objection, however specific, could properly have led to the exclusion of any of the evidence to which reference has so far been made.

Two other exceptions to evidence are presented, arising upon specific objections taken to questions addressed to the plaintiff while testifying in reply to the case made by the defense. The defendant had put in evidence the entire pamphlet prepared by him, containing, among other things, his letter of dismissal addressed to the plaintiff, dated Santee, March 25, 1876, in which he states, as the ground and reason of that action, the plaintiff's persistent disregard of pecuniary obligations, and his evil report in that neighborhood, and, in the rehearsal, referring to that event, says: "The removal of the Rev. Mr. Hinman from the Niobrara mission was the culmination of grave dissatisfaction with his conduct on the part of the Indian committee and myself, which had existed several years." Two specific reasons, however, were given for the act; (1) His persistent disregard of his pecuniary obligations; and (2) the evil reports which covered his name—and, as if by way of specification, says: "In the year 1872, Mr. Hinman was found to be in debt to an amount over \$14,000." The plaintiff, being upon the stand in reply, was asked the question: "That letter alludes to your financial difficulties, and in this paper that he calls his 'Rehearsal of Facts,' he states that you were found to be in debt to an amount over \$14,000. State to the jury whether you owed, or at least, what that \$14,000 refers to,"—to which the defendant objected, on the ground that the rehearsal was put in evidence

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simply for the purpose of showing that the publication of the pamphlet was privileged, and that the matters inquired of are not those alleged in the complaint to have been libelous, and therefore they must be assumed in this action to have been considered at the time the suit was brought by the plaintiff as true. Objection overruled; defendant excepts. The objection is not tenable. A failure to sue for libel is not a conclusive admission of the truth of the matter charged, and the selection of one or more of several imputations as the ground of action does not estop a party from denying the others. And when, as in this case, the defense is that of privilege, the falsity of any of the statements made may be shown; and, if it also appears that they were known to be false, the character of the statement, and the knowledge of the author become material upon the question of actual malice. The question was proper without reference to the information obtained from the answer of the witness. But by that it appeared that the \$14,000 was an indebtedness to the whole mission along the Upper Missouri river, accumulated for two years while it was under the plaintiff's charge, and the whole matter had been investigated and settled satisfactorily to all parties concerned, and without any reflection on him before Bishop Hare took office. It was for building churches and mission-houses, and all sorts of expenses of the mission, and was under the plaintiff's charge before Bishop Hare became bishop, and it was settled and paid, and he knew it.

BY THE COURT: "Do you mean to say it was all settled and paid up before March 25, 1878?"

A. "Yes, sir; long before that; before he became bishop."

Now it appears that the defendant became bishop in 1873. Surely, upon the questions I have suggested, the explanation called for by the question was pertinent.

So with the next exception. The defendant in his pamphlet had referred to Bishop Whipple as his authority, for the general statement affecting the character of the plaintiff say-

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ing: "At the general convention of 1877, Bishop Whipple remarked to me that stories were again afloat reflecting upon Mr. Hinman's character for purity, and that Mr. Hinman must be, to say the least, a very imprudent man."

The defendant examined the bishop as a witness *de bene esse*, and the plaintiff when replying to the case of privilege read from that examination; the bishop says that in the fall of 1877, he was present at the general convention in Boston; that the first he heard of rumors in the Indian country, affecting Mr. Hinman, was from the defendant, in the house in Boston where," he says, "we met." Bishop Hare "said to me, 'Those sad rumors against Mr. Hinman have come up again, and I have evidence that would go to show his guilt;' my reply was; 'if that is the case, you have no option in the matter, except at once to proceed and bring him to trial; 'at that time I think there was no more conversation; he mentioned to me on a subsequent occasion the character of some of the evidence he had; this second conversation was within a few days * * * I am very positive that I did not first mention the subject at that time to Bishop Hare.

And the defendant also read from the same deposition: "It is my impression that when I was in Boston and Bishop Hare spoke to me on the subject before referred to that the first communication was by Bishop Hare to me, because I was so much shocked at what Bishop Hare told me about this loan of \$500; it showed very great kindness on the part of Bishop Hare toward Mr. Hinman, and that Mr. Hinman had not paid that money or taken any steps towards it; it rather horrified me; then when he mentioned the other matter, I was very much startled, as coming from him; if it had come from anybody else, it would not have produced as much impression on my mind."

While the plaintiff was on the stand his attention was called to this testimony, and he was asked to state whether at the

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“time of the conversation between the defendant and Bishop Whipple, the note was paid.”

The defendant's counsel objected to the question, because the statement was not in the pamphlet, but drawn out from the examination of Bishop Whipple. It was properly allowed. If at that time the note was in fact paid, the statement by defendant, implying at least the contrary, would have a bearing upon the *bona fides* of the pamphlet and the honesty of the rehearsal. There certainly might be a persistent disregard on the part of the plaintiff of his pecuniary obligations; but if to the knowledge of the defendant the ones specified by him were paid, one as far back as 1872, and the other in 1877, the circumstance was to be considered in the determining whether in the statements made, the defendant did not exceed his privilege. Besides, the existence of the note was made part of the defendant's case, the statement concerning it to Bishop Whipple was by the defendant, and it was clearly competent to prove that statement was untrue.

It is also said in behalf of the appellant that questions put by the plaintiff's counsel to Bishop Whipple were so obviously wrong and so material in their effect as to require a new trial to correct the error. It did not seem so to the trial judge, or the general term, and the reasons given by the latter for refusing to sustain the exception are not answered by the appellant. The testimony of the witness, Whipple, had been taken *de bene esse* in behalf of the defendant, and at the trial his counsel read from the deposition, that in 1860, and 1865, the plaintiff was under the jurisdiction of Bishop Whipple; that in 1865 rumors prejudicial to the plaintiff's character were brought to his attention, and that, as bishop, he took action in reference to those stories,” by appointing a commission to examine every one of the rumors, and take proof in regard thereto; that testimony was taken, submitted to a standing committee, and the defendant drew from the witness the result reached by the committee, viz.: that there was nothing which affected injuriously the character of Mr.

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Hinman, and the impression of the witness that "they said there was not evidence of indiscretion," although of that he was not positive, that the witness examined the evidence and reported the conclusion reached, and the testimony on which it stood to some 40 persons. No writing was in evidence, and, although the examination instituted by the board was of a judicial character, no writing was produced by the defendant containing the conclusion reached, nor did it appear that the bishop's conclusion was put in that form. It will be seen, therefore, that the defendant had put in evidence a narrative of the proceedings, with the apparent purpose of prejudicing the plaintiff by showing rumors of like character to some of those stated as in existence 10 years later.

It also appeared by that examination that the rumors were found by those whose duty it was to follow them to be groundless, and, inferentially at least, that such was the conclusion of the bishop; for it cannot be supposed that the bishop would present to the persons of his charge a statement of his committee in exoneration of Mr. Hinman unless he himself concurred. But this does not appear distinctly upon the defendant's examination; and, on the same *de bene esse* proceeding, the plaintiff asked the witness on cross examination: "From the examination that you made of the evidence in regard to those charges in 1865, did you form any conclusion in your mind as to the innocence or guilt of Mr. Hinman?" This question involved a fact or circumstance directly connected with matters stated on direct examination, and, moreover, it was not objected to at the time of the *de bene esse* examination. It would seem that no just exception could lie to it. The bishop was shown to have been charged with the duty of investigation, and to have prosecuted it. There can be no good reason why he should not be permitted to state whether he reached a determination as to the matter investigated. Nor, indeed, was any suggested by the counsel for the appellant. The witness replied: "I did, most decidedly." Now, was not

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the plaintiff entitled to that conclusion? The thing affecting him had been brought out by the defendant. The existence of rumors reaching the ear of the bishop, and of sufficient moment to move him to the exercise of his jurisdictionary power of discipline, he himself to be the arbiter, after an investigation. The defendant had gone into it again. The whole matter, occurring in 1865, long before the matter in issue, was irrelevant and foreign to it. But it had been brought forward by the defendant, and the plaintiff was entitled to give the whole proceeding to and including the conclusion reached by the ecclesiastical officer, the plaintiff's superior, in order to rebut any injurious inferences which might be drawn from the portion of the deposition read by the defendant. The effect of that portion could only be to prejudice the jury; and the plaintiff had a right to remove, if he could, the prejudice, by showing the decision of the examining tribunal. It would permit the defendant to put the plaintiff in a very false position if, after showing not merely the existence of rumors, but also that they were so current and of such violence as to attract the attention of an ecclesiastical tribunal, and so effectually as to cause an investigation to be set on foot, the defendant could strike out the conclusion reached by the person directing the investigation, and whose conviction as to its result was material. The next question, therefore, by the plaintiff, was a material one. He asked: "What was that conclusion?" The defendant "objected," assigning no ground. For the reasons above stated, we think it was admissible. It may be said, also, that the question put could by no possibility harm the defendant; for, as I have shown, the product of the direct examination permitted the inference, if it did not expressly show that the bishop reached the same conclusion afterwards testified to by him in answer to this question. It may have been cumulative and unnecessary; it was not irregular nor harmful. But, in any view, the defendant cannot complain,

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for his own examination of the witness naturally led up to that of the plaintiff.

Some other exceptions were taken to the rulings upon evidence. So far as they have been examined by the general term, we agree in their conclusion ; and, in regard to others not particularly discussed, we find no ruling which an orderly and consistent conduct of the trial did not require. A more interesting subject is presented by the exceptions suggesting errors in the refusal of the court to add to its exposition of the law as applicable to the issues before the jury, and concerning which the great volume of testimony had been submitted. The charge was long, but in view of the mass of evidence, and the importance of the questions to be answered, not unnecessarily extended. It exhibits, as does, indeed, the entire record, scrupulous care and attention on the part of the learned judge, so to direct the progress of the cause as to enable the jury, by their verdict, to reflect the very truth of the case ; and with such success on his part was the last duty performed that to the charge itself no exception whatever was taken, and no error of misdirection is alleged by the appellant. His contention is that some additional information and explanation as to the law should have been given ; and it appears from the record that at the close of the case the learned counsel for the defendant presented 18 separate propositions for submission to the jury. No ruling, however, in regard to any of them was then made or asked for ; and the judge charged the jury with more or less fullness upon every topic suggested by them. At the close of the charge, as before observed, no exception was taken to any part of it. The case then states : The court refused to charge, except as already charged in respect to defendant's second, fourth, sixth, fourteenth, sixteenth, seventeenth and eighteenth requests, and defendant's counsel duly excepted. It seems then, that the disposition made of the larger number of the propositions was satisfactory to the defendant. It was not suggested that any

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one of the propositions was unnoticed or not charged upon, and two only, the second and sixth, are upon this appeal brought to our attention. Within the well settled and frequently applied rule, therefore, the exception is unavailing.

In *Ayrault v. Pacific Bank*, 47 N. Y. 570, the defendant's counsel presented requests to charge upon 16 distinct points. The exception was to the refusal to charge each of the requests submitted except so far as embraced in the charge delivered substantially the same as in the case at bar, the court on appeal say :

“Whether they were all especially and succinctly noticed by the judge in his charge is not important. Doubtless all that were material were responded to, but this can only be ascertained by a careful and critical study of the charge and the requests in connection. This court is not called upon to perform this task.”

It was for the counsel to do this upon the trial, and point out what additional instructions if any were necessary, and in what respect the charge was claimed to be erroneous or insufficient, and wherein it did not conform to the request made. The exception should present the very point intended to be raised, in order that the trial judge may correct the error if either directly or by omission one has been committed.

This rule is reasonable and well settled, and from it there should be no departure. In *Requa v. Rochester*, 45 N. Y. 137, we said : “Such an exception is of no avail. It does not point out in what the counsel conceives that the court has erred. It gives no aid for the correction of an error into which a judge has fallen;” and in *Walsh v. Kelly*, 40 N. Y. 559, under similar circumstances it is said :

“When the judge had completed his charge it was the duty of counsel to call his attention to any portion where he desired more specific instruction.”

Here the charge covers upwards of seventy folios. It is conceded to be correct so far as it went, even in respect to

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the matters covered by the requests. It is not the duty of an appellate court to compare one with the other, and to ascertain how much further the instructions should have gone, until the trial judge has had the opportunity to complete the work. It has nevertheless been performed, and this decision has been delayed that neither time nor investigation should be lacking to discover if there existed any error of law which might have prejudiced the defendant in the disposition by the jury of the questions of fact. We find none.

Nevertheless, in view of the earnestness and zeal with which the learned counsel for the appellant has pressed the exception to the ruling of the court in regard to the second and sixth requests, something more may be added. The second was in these words: "That if the defendant had probable cause for believing at the time he issued the pamphlet, the statement charged to be libelous, the plaintiff cannot recover."

The charge actually given was more favorable to the defendant.

"I say to you now (adds the court) if any doubt has heretofore obtained with regard to it, that it proceeds directly and logically from what I have already said, that the communication being privileged and excused unless it originated in malice, that malice is not established by showing that the reports brought to the defendant were in fact untrue. The plaintiff has testified here that he did not commit these acts complained of, and that he is guiltless of them. The question is, however, whether these reports were brought to the defendant in such a manner as to lead him to believe that they were true, and whether he did in fact honestly and in good faith believe, when he included these reports in his publication, in July, 1879, that the plaintiff was of the evil reputation ascribed to him in that publication and that his name had become a by-word. The question is not whether in making this publication he did what you would

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consider the wisest thing. There is no other standard by which human conduct can be judged, under such circumstances and conditions as existed in this case, than that of entire honesty and good faith. Of this you are to judge upon a consideration of all the evidence. The question of good faith under all the circumstances may be safely committed to your determination,"—not leaving it for the jury to say whether there was in fact probable cause for the statements, but whether the defendant himself acted honestly in good faith in the belief that the statements were true."

The next request was in these words: "That the incidents connected with the communion services of March 23 and 25, 1878, do not tend to prove malice, and should be laid out of view by the jury." Counsel for both parties commented upon them to the jury, and there had been read in evidence the rules and regulations established by the church of which plaintiff and defendant were members, to show not only the general nature of the sacrament and its administration, but the persons entitled to participate in the communion. In its observance both had taken a part either as actor or participant, under circumstances fully disclosed by the testimony.

I am unable to find error in the refusal, or that the trial judge could have taken from the jury so important a matter, in which the defendant's conduct was displayed. What he afterwards published was then known to him. Was his conduct in accord with a belief in its truth? The object was to exhibit his state of mind at the time of that publication. Did he with that knowledge deal with the plaintiff as one whom he believed guilty of acts which in any community would justify his disgrace and render him not only unfit for his position, but an unseemly associate? It was a circumstance the weight and meaning of which could only be determined by a jury, but it was relevant. It bore upon the belief of the defendant as to the acts attributed to the plaintiff.

The conduct or expressions of a defendant in such a case

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may show affirmatively that, in making the charges, he was actuated by ill will, and not by belief. The same result is reached by evidence of conduct inconsistent with that belief and if, from the whole conduct of the defendant, the jury might infer that he did not believe the imputations to be true, but still made them, the plaintiff might have a verdict. It should be observed, also, that the request was not confined to the bearing of the circumstance upon the question of malice, but its exclusion for all purposes; that it "should" (and the defendant) "be laid out of view by the jury." The evidence was competent as relating to the conduct of the defendant, his belief in the facts afterwards alleged, his state of mind, and it might not unreasonably be considered in weighing his own and the plaintiff's testimony. It was, moreover, upon a subject introduced by the defendant, and further examination as to it was in reply. Even if it had no tendency to show malice, the defendant was not entitled to the charge, because the request was coupled with the untenable proposition that the evidence should be wholly disregarded. All that the defendant said of or to the plaintiff, or said or did in his relations with him, may well be deemed relevant to an inquiry as to his real opinion and belief as to the plaintiff. But, without this, it is an abundant answer to the request that the subject was first broached by the defendant, and further examination as to it was in reply. But the court had already referred to the defendant's version and position in regard to the matter. He had stated also the plaintiff's contention. He had discussed the whole question, and to none of his views or directions in regard to it was any exception taken. Referring to the defendant's position, he said :

"If that was the defendant's view of his duty towards the plaintiff and the plaintiff's right as a presbyter under the rules and canons of the church, it is difficult to see upon what ground he could have repelled him, whatever his opinion of the plaintiff's guilt or innocence of the evil reports concerning him might be; for the plaintiff's office as a presbyter was unquestioned."

Opinion, PER CURIAM.

The charge was most favorable to the defendant. Under it, the publication, although libelous, was held entitled to protection whether the matters alleged are true or false, so far as it was made in the fulfilment of a duty, or called for by an occasion created by the plaintiff. The jury must have found that it originated in malice,—not malice in law, but actual ill will against the plaintiff,—and was not made in a belief of its truth. The experienced trial judge did not disapprove of the verdict. It was satisfactory to the judges of the general term, who had authority to examine all questions, whether arising upon the facts or the law. I find no legal cause to reverse their conclusions, and think the judgment which followed it, and from which the appeal is taken, should be affirmed.

FINCH, J., concurs.

HANNAH ALEXANDER, as Administratrix, etc., Respondent,
v. EMMA A. SUMNER, Appellant.

Court of Appeals, January 18, 1887.

Improper allowance. Stipulation to deduct.—An item charged and allowed to plaintiff's intestate as a counterclaim, in a former action brought by defendant's husband against said intestate, is improperly allowed again in an action by his administrator against defendant, and such improper allowance constitutes sufficient error to justify a reversal, unless plaintiff will consent to deduct such item and pay costs of appeal.

Appeal from a judgment of the general term, affirming a judgment entered upon the report of a referee.

William W. Badger, for appellant.

J. T. Marean, for respondent.

PER CURIAM.—We think the case shows that the item of

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\$122.50, with interest from November 19, 1877, credited by the referee to the plaintiff's intestate, for interest paid by him at that date on the Phillips mortgage, was charged and allowed in the prior action brought by the defendant's husband against the intestate, as a counterclaim in that action. It should not, therefore, have been allowed again in this action. With this exception we think the findings of the referee were justified by the evidence, or, at least, that there was not such an absence of evidence in respect to any of them that this court can interfere with his conclusion. An order should be entered reversing the judgment and directing a new trial, with costs to abide the event, unless the plaintiff stipulates to deduct therefrom the credit of \$122.50, and interest, and the costs embraced therein, and to pay the costs of the appeal to this court, in which case the judgment, as modified, is affirmed, without costs to the plaintiff.

All concur.

Judgment affirmed.

JACOB H. CONKLIN *et al.*, TRUSTEES, Appellants, v.
GARRET Z. SNIDER, Respondent.

Court of Appeals, January 18, 1887.

Affirming same case, 36 Hun, 642, mem.

1. *Evidence.* Section 829.—In an action brought by a trustee against the executor of his co-trustee to have lands standing in the name of said deceased trustee declared part of the trust estate, the surviving husband of a deceased sister of said deceased trustee, who was not personally interested in the trust estate, but whose children were interested, was a competent witness concerning conversations had with the deceased.
2. *Appeal. Judgment absolute.*—Where the general term order reversing a judgment entered on the report of a referee, and directing a

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new trial, is not erroneous, but a proper one, the court of appeals, though it may not agree with all the reasons given by the general term for its order of reversal and award of a new trial, will feel bound to affirm such order, and award judgment absolute against the plaintiffs, upon their stipulation on appeal, notwithstanding the court can see that they might have been entitled to a part of their relief. Where the error, which has justified a reversal, was merely incidental, capable of accurate correction, the court has, in one or two instances, modified the judgment by correcting the error, but these were cases in which it thought a new trial ought not to have been awarded, since there could be no recovery for what had been erroneously allowed.

See note at end of case.

3. *Same. Discretion.*—The general term may possibly have made an alternative order, permitting the plaintiffs to limit their judgment to the established relief, and on their stipulating so to do, affirming the judgment as modified; but this was matter of discretion, and to award a new trial instead, was not error.

Action brought for an accounting against the executors of a deceased trustee, and to have certain lands conveyed to said trustee declared to be part of the trust estate created by the testator. On the trial one John Cooper, a party defendant, was allowed to testify in behalf of the plaintiffs on objection and exception, to certain conversations with said deceased trustee relative to the lands in question. The witness was the husband of said trustee's half-sister who was a beneficiary under the will. She died between the commencement of the action and the trial, and her children, who were issue of this marriage, claimed an interest in the trust estate.

Appeal from an order of the general term of the supreme court, reversing a judgment in favor of plaintiffs and awarding a new trial.

W. J. Hardy, for appellants.

Irving Browne, for respondent.

FINCH, J.—While we do not agree with all the reasons given by the general term for its order of reversal and

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award of a new trial, we feel bound to affirm that order. The action was brought to reclaim for a trust-estate several groups of real property, alleged to have been purchased by the trustee in his own name, as an individual, but with the trust funds. The referee found in favor of the plaintiffs, determining that all the lands described in the complaint belonged to the trust. On appeal the general term reversed the judgment, assigning as reasons that the testimony of one of the parties to personal conversations with a deceased testator was improperly admitted, and that the trust funds were not satisfactorily traced by the evidence into any of the lands referred to. We think the testimony of Cooper was not offered or given in his own behalf, and was admissible, and that the evidence very fully and fairly demonstrated that a portion of the lands, known in the case as the "Brooklyn property," did belong to the trust-estate, but that, as to the rest of the property, the proof fell far short of the certainty and definiteness required. It is not needful to explain the grounds of our opinion, so far as it differs from that of the general term, because, if that of the latter had been identical with our own, it would still have been the duty of the court to have reversed the judgment of the referee and awarded a new trial for the error committed as to the property other than the Brooklyn lands. We cannot say, therefore, that the order of the general term was erroneous. Possibly it might have made an alternative order, permitting the plaintiffs to limit their judgment to the Brooklyn lands, and, on their stipulating so to do, affirming the judgment as modified; but that was matter of discretion, and it was not error instead to award a new trial.

The defeated plaintiffs were beaten for lack of evidence, and were entitled to an opportunity to strengthen their case in any of its parts, for the decision left a recovery by them possible. The order of the general term having been a proper one, we cannot reverse, but must affirm it, and the plaintiff's stipulation on the appeal to this court compels an

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award of judgment absolute against them. We have once or twice, in cases where the error which might have justified a reversal was merely incidental, capable of accurate correction, modified the judgment by correcting the error, but those were instances in which we thought a new trial ought not to have been awarded, (*Wright v. Nostrand*, 98 N. Y. 669,) since there could be no recovery for what had been erroneously allowed. Here such a recovery was possible, and the award of a new trial was a proper order for the general term to make, and we must affirm it, and order judgment absolute, although we can see that plaintiffs might have been entitled to a part of their relief. *Gray v. Board of Sup'rs*, 93 N. Y. 608; *Thomas v. New York Life Ins. Co.*, 99 N. Y. 250; *Godfrey v. Moser*, 66 N. Y. 250. They chose to take the peril of their stipulation.

Order of the general term affirmed, and judgment absolute directed against plaintiffs.

(All concur.)

NOTE ON SUBDIVISION 1 OF § 191 OF THE CODE.

The right of appeal to the court of appeals from an order of the general term granting a new trial on a case and exceptions, depends upon the provision of subdivision 1 of § 191 of the Code of Civil Procedure, which reads as follows:

Subdivision 1, § 191. An appeal cannot be taken from an order granting a new trial, on case or exceptions, unless the notice of appeal contains an assent, on the part of the appellant, that if the order is affirmed, judgment absolute shall be rendered against the appellant.

When judgment absolute may be rendered. In *Lanman v. The Lewiston R. R. Co.*, 18 N. Y. 493, the plaintiffs had judgment at special term for damages and costs. The defendants appealed, and the general term ordered a new trial, unless the plaintiffs would deduct a certain sum from the judgment; in case they consented to the deduction, judgment of affirmance was given as to the residue of the judgment. The plaintiffs did not consent to the deduction, but appealed to the court of appeals, stipulating, in the notice of appeal, that, if the order shall be affirmed, the deduction shall be made from the judgment and the residue thereof affirmed. Plaintiffs afterward moved to dis-

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miss their appeal, on payment of costs and the motion was granted. It was held that the consent in notice of appeal was quite different from that which the act requires. The plaintiffs agreed, if they failed, that judgment should be rendered in their favor, while the statute says that in that case judgment absolute must be rendered against them.

The provision of the Code as to appeals to the court of appeals from orders granting new trials is, that no such appeal shall be effectual for any purpose unless the notice of appeal contains an assent, on the part of the appellant, that, if the order is affirmed, judgment absolute shall be rendered against the appellant. This provision was intended to meet that class of cases, where the party prevailing at the trial is satisfied either to sustain his verdict by the judgment of the court of appeals, or fail altogether in his action or defense. It embraces a large class of cases in which a new trial can only be a useless expense, because the whole merits are presented and disposed of by the decision of the question of a new trial. Its terms are rigid for the very purpose of confining appeals from orders granting new trials to the class of cases mentioned, and it is only in that class of cases in which the merits are all presented on the motion for a new trial that this sort of appeal can be safely brought.

In *People ex rel. Judson v. Thacher*, 55 N. Y. 525, it was held that the authority to appeal from an order of the general term granting a new trial given by § 11 of the former Code, does not apply to an action by the people to oust defendant from an office and to establish the right of a relator thereto; that section contemplates cases where final judgment can be given under the appellant's stipulation, which will dispose of the entire question in controversy. The defendant in such a case cannot of right appeal from the order granting a new trial, otherwise it would be in his power to prevent a recovery by the relator upon his title, though the right to have his claim determined in the action is expressly given. As the public is interested in the question litigated, the appellant cannot, by stipulation, give to another party, who has no verdict in his favor, a right to the office. A final judgment against the appellant will not establish the right of the other claimant, and, if given, will deprive the latter of the opportunity of establishing it.

In *Conger v. Conger*, 77 N. Y. 432, an action has brought for a divorce, on the ground of adultery. It was tried before a referee, and he reported in favor of the defendant, and judgment was entered upon such report at special term. From that judgment, the plaintiff appealed to the general term, and there the judgment was reversed, upon questions of fact, and a new trial was ordered. The defendant then appealed to the court of appeals, giving stipulation for a judg-

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ment absolute in case of affirmance of the order. A motion was made to dismiss the appeal, on the ground that in a case like the present, an appeal from such an order is unauthorized. It is claimed that in case of affirmance of the order, judgment absolute cannot be rendered against the defendant upon the stipulation, that the stipulation is, therefore, inoperative, and hence that the appeal is not authorized. And it was held that the order of the general term was appealable to the court of appeals; and that, in such case, upon affirmance of the order of this court, judgment absolute can be rendered against the appellant upon such stipulation, as the question of adultery has been tried, and the decision of the general term and of the court of appeals is to the effect that the defendant is guilty, and the judgment, therefore, will be based upon evidence and upon judicial determination.

If the judgment had been reversed, for some error of law not involving the general merits of the case, a different question, it seems, would have been presented.

When judicious to give stipulation for judgment absolute.—In *Hitchings v. Van Brunt*, 38 N. Y. 335, it was held that, where the court below gives a plaintiff his election to remit a part of the sum recovered and take judgment of affirmance for the residue, or to submit to an order for a new trial, and, instead of remitting, he allows the order granting a new trial to be made, and appeals therefrom to the court of appeals, giving the usual stipulation that, if the order is affirmed, judgment absolute may be entered against him, the court of appeals cannot relieve him from his stipulation on affirming the order. In such case, the defendant is entitled to final judgment, however clear it may be that the plaintiff was entitled to recover the amount for which he was, in the court below, permitted to have judgment.

There is but a single class of cases, and the individual cases coming within it are rare, in which the course of risking an appeal to the court of appeals from an order granting a new trial, with the stipulation, can prudently be adopted. *Cobb v. Hatfield*, 46 N. Y. 533. It is only proper and admissible, when the sole question, that can be presented upon the record, relates to, and will determine, the merits of the controversy, unembarrassed by incidental questions affecting the trial, but not necessarily decisive, of the true merits of the litigation. *Id.* If every fact that can affect the result has been, upon the trial, adjudged favorably to the party against whom the new trial has been granted, and no exceptions have been taken to the admission or rejection of evidence, or to the rulings upon minor or incidental questions in the progress of the trial, which, if well taken, will entitle the exceptant to a new trial; in other words, if the objections and exceptions taken at the new trial, and to the recovery, cannot be obviated upon a second trial, but the verdict and judgment must necessarily be adverse

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to the party against whom the new trial has been granted, if the order and decision stand, an appeal from the order, with the stipulation for judgment absolute in case the order is sustained, may be advisable. But ordinarily, there are exceptions, which, if well taken, will entitle the unsuccessful party to a new trial, but the decision of which will not finally or necessarily determine the merits of the action or the rights of the parties; and in such cases, the exceptions must be clearly frivolous to justify the hazard of an appeal from the order granting a new trial, with the consent to a judgment absolute upon an affirmance of the order. Though the decision of the questions presented by the record may not be necessarily fatal to the appellant, they may be made so by the appeal from the order, and the giving of the ordinary statutory stipulation, and the appellant thereby lose the benefit of a second trial.

In *Dickson v. The B'way & Seventh Ave. R. R. Co.*, 47 N. Y. 507, it was held that the plaintiff, by stipulating that, upon an affirmance by the court of appeals of the order granting a new trial, judgment absolute shall go against him incurs the peril of an adverse decision upon any one of several exceptions, none of which or all together present questions which denied adversely to him will be necessarily fatal to the action, instead of availing himself of a second trial, upon which every objection taken and made to a recovery may be obviated. When a new trial has been granted in an action tried by a jury upon a record presenting questions of law only, and the record presents no question or exception upon which the order can be sustained in the court of appeals, except such as, decided adversely to the party complaining of the order, will be conclusive against him in the action, that is, necessarily fatal to his action or defense, so that in no aspect his case can be varied, or put in better form, upon a retrial, an appeal to the court of appeals from the order is proper and advisable. In such a case, the delay and expense of a new trial will be nugatory, and the party hazards nothing by the appeal.

The court of appeals is not authorized to review the facts, or sit in judgment upon the verdict of a jury: The decisions of this court are uniform, that when, after a trial by jury, a new trial is granted by the court below, this court has no power to review a question of fact. See *Sanford v. The Eighth Ave. R. R. Co.*, 23 N. Y. 343; *Young v. Davis*, 30 Id. 134. When the record brought into this court presents a case in which the court below may have granted a new trial upon questions of fact, or, in other words, when it does not appear by the record that the new trial must have been granted on questions of law, this court cannot review the decision.

In order to justify an appeal to the court of appeals from an order granting a new trial, in an action tried by a jury, there should be no

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dispute as to the facts, and the questions presented must be purely of law.

In *Godfrey v. Moser*, 66 N. Y. 250, it was held that where, upon appeal to the court of appeals from an order of general term granting a new trial on a case or exceptions, this court determines that no error was committed, it is imperative that in such a case it shall render judgment absolute upon the right of the appellant; and although injustice may be done him, the court has no authority to allow him to withdraw his stipulation for judgment absolute, or to give him the benefit of a new trial; when, instead of availing himself of the new trial granted by the court below, he appeals and necessarily assumes the hazard of injurious consequences.

It was held, in *People v. Sup'rs of the county of Essex*, 70 N. Y. 228, that, upon appeal to the court of appeals from an order of the general term granting a new trial, the court is not confined to the grounds upon which the decision below was based; but, if any other ground, sufficient to sustain the order, appears, it will be upheld.

In *Harris v. Burdett*, 73 N. Y. 136, it was held that an appellant on an appeal to the court of appeals from an order granting a new trial in a case tried by a jury, incurs the hazard, that, if any material exception taken at the trial turns out to have been well founded, whether passed upon or not in the opinion at the general term, the order may be affirmed and judgment absolute rendered against him in pursuance of his stipulation.

Appeals from orders granting new trials are an innovation upon the practice heretofore existing, as appeals and writs of error have been confined to final judgments or decrees. *Mackay v. Lewis*, 73 N. Y. 382.

There are but comparatively few cases in which the right of appeal from an order granting a new trial can safely be exercised. The appellant takes the risk, not only of the questions considered by the court below, and upon which it has made the order, but of every other exception appearing upon the record, and every legal question that can be made by the respondent, who may sustain his order upon showing any legal error whether noticed or not by the court below. *Id.* Appellants have not unfrequently been brought face to face with insuperable objections to the judgment they sought to have restored by a reversal of the order granting a new trial, which they had overlooked and the court below had not found it necessary to consider, and had final judgment against them, when, by submitting to the order and going back to a new trial, they might have succeeded. *Id.*

In other words, the privilege of an appeal in such a case has proved a trap to the unwary suitor, who, upon the faith that the court had

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erred in the precise point passed upon, have thrown away a good cause of action. *Id.*

If an appeal is considered by the court of appeals upon the merits, and the court comes to the conclusion that there was error upon the trial, and that the order should be affirmed upon any ground, the statute is imperative, and judgment absolute must be given against the appellant. *Id.* The court cannot relieve the party from his stipulation. But where a party appeals under a mistake, and, before a decision of the appeal by the court of appeals, asks permission to withdraw it, if the court is satisfied that the proceeding has been in good faith, leave is ordinarily given to dismiss the appeal on payment of costs. *Id.*

By § 190 of the Code, every party has the right to appeal from an order granting a new trial, and the only requirement is by § 191, that the notice of appeal shall contain an assent on the part of the appellant that, if the order is affirmed, judgment absolute shall be rendered against him. *Williams v. W. U. Tel. Co.*, 93 N. Y., 162. A party cannot be deprived of that right, because he happens to be joined with others as defendants in a suit. It may be otherwise, if the defendants are jointly interested in the defense, viz., if the defendants are sued as partners. But where their liability is a several liability, a defendant has the absolute right, without joining with the other defendants, to appeal from an order granting a new trial and stipulate for a judgment against him in case of affirmance. If the other defendants do not desire to appeal or give a stipulation, they can go back to a new trial. In such a case, the whole matter is within the control of the court. If deemed wise, the court of appeals can postpone the argument of appeal, until the new trial as to the other defendants, should be had; or the trial, as to the other defendants, may be suspended by the court below until the appeal shall be heard. The course to be pursued is always in the discretion of the courts, which is to be exercised in view of the circumstances of the particular case. *Id.*

In *Gray v. The Board of Supervisors*, 93 N. Y. 603, it was held that, where a money judgment is reversed *in toto* by the general term, under the stipulation required on appeal to the court of appeals, if the order of reversal is affirmed, judgment absolute against appellant must be directed, although the evidence would have justified a judgment for a less amount than that rendered.

In *Holcomb v. Munson*, 103 N. Y. 682, a judgment was entered upon the referee's report. The defendants appealed to the general term, and the general term reversed the judgment and directed a new trial. The plaintiff then appealed to the court of appeals from the order of reversal with stipulation for judgment absolute in case of affirmance. It was held that upon such an appeal, the appellate court will examine

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the whole record for the purpose of discovering whether any errors were committed by the trial court which would authorize an order of reversal by the general term, and if found, will affirm the order appealed from, and order judgment absolute for the respondent.

In *N. Y. State Monitor Milk Pan Co. v. Remington*, 109 N. Y., 143, it was held that, on appeal to the court of appeals by a plaintiff from an order granting a new trial, where it appears that the demand is excessive by reason of the adoption of an erroneous measure of damages, and there is a defect of proof so that the court can see that the judgment is erroneous, but it is impossible to say precisely how much it should be reduced, judgment absolute must be granted upon the stipulation.

In *Webber v. Truax*, 61 How. 34, the question raised by the pleadings and litigated by the court below is, was the assignment to the plaintiff of the claims which form the subject of the action, made in fraud of the assignor's creditors? The evidence on both sides did not leave the question free from doubt. The jury took one view of the evidence, and the general term another, and the difference was owing entirely to the fact that what the jury regarded as suspicious circumstances seemed to the general term to be devoid of any taint of fraud, and that the witnesses, whose testimony the jury rejected, were credited by the general term. An appeal was taken by defendant, upon stipulation, to the general term of the common pleas, from an order of the general term of the marine court, setting aside the verdict as against the weight of evidence. And it was held that, as there was a controverted question of fact involved to go to the jury, judgment absolute must be given against the defendant upon affirmance.

In *Brown v. Simons*, N. Y. Com. Pl., April 2, 1888, the court held that where an appeal is taken to it from an order of the general term of the city court that grants a new trial, and the appeal is submitted to it for decision, it will affirm the order and give judgment absolute against the appellant, whenever it discovers in the record an exception that is sufficient to warrant the order for a new trial; and that it does this, even though the exception may not have been noticed by the city court.

But where the appellant discovers his mistake in appealing to the general term of the common pleas, and at or before the argument, asks permission to withdraw the appeal, this court dismisses the appeal, on payment of costs, where there is no doubt of the appellant's good faith in taking the appeal. See *Mackay v. Lewis*, *ante*.

The rule which the general term of the New York Court of Common Pleas applies in determining whether to dismiss the appeal, or whether to give judgment absolute against the appellant, where an appeal is taken to it from an order of the general term of the city court grant-

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ing a new trial, may be found in the cases of *Tinsdale v. Murray*, 9 Daly, 446; *Sands v. Crooke*, 46 N. Y. 569; *Harris v. Burdett*, *ante*.

Effect of judgment absolute.—In *Hiscock v. Harris*, 80 N. Y. 402, the plaintiff sought to recover upon an item in an award made in his favor. The defendants in their answer alleged that the award was procured by fraud of the plaintiff, and asked that the award be adjudged to be void, that the same be vacated and set aside, that the submission be declared to be revoked, that the complaint be dismissed, and that they have judgment accordingly. To this answer there was a reply denying the facts upon which it was based. The referee reported in favor of the plaintiff, and the general term granted a new trial. On appeal to the court of appeals, the order of the general term was affirmed, and judgment absolute ordered in favor of the defendants. In such case, judgment absolute upon the right of the appellant can mean only that the award must, by the judgment, be declared void. It is true that the language of the opinion of Judge EARL, taken literally, may be construed to go much further, but it must be construed by the facts of the case in which it was given.

Where a set-off or counterclaim is set up in the answer, though not proved or thought of on the trial, and upon such trial the plaintiff has a recovery, which the general term reverses, on appeal under the usual stipulation to the court of appeals, an affirmance of the order of reversal will not necessitate a judgment for a counterclaim which never existed, was unproved on the trial, and only claimed *pro forma* in the answer. *People v. Denison*, 84 N. Y. 272; 59 How. 157; 8 Abb. N. C. 128. A party who seeks to review a decision which overturned his right to recover, does not take the hazard in doing so, of paying a claim against himself, the only existence of which is to be found in the pleadings.

Section 194 of the Code provides; "Upon an appeal from an order granting a new trial, on a case or exceptions, if the court of appeals determines that no error was committed in granting the new trial, it must render judgment absolute upon the right of the appellant; and after its judgment has been remitted to the court below, and assessment of damages or any other proceeding, requisite to render the judgment effectual, may be had in the latter." Under this section, the court is not to render an absolute judgment for every claim made by the defendant in his pleading, but upon the right of the appellant, which the appeal involves, and which the order appealed from denied him. *Id.* The affirmance of the order need not deprive the defendant of any set-off or counterclaim, for that may be protected by the order of the appellate tribunal, which can make it in such form, when that is necessary, that the court below may direct an assessment of

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damages, or any other proceeding, requisite to render the judgment effectual. *Id.*

In this case judgment was rendered upon the report of referees in favor of plaintiff. This was reversed by the general term. The Attorney-General on appeal to the court of appeals gave the required stipulation for judgment absolute. It was held that such stipulation was not an assent to an affirmative judgment on the counterclaim set up in the answer. It was merely a stipulation which the law compelled him to give, to enable him to take the appeal to the court of appeals from the order granting a new trial, and its form was, that, in case the new trial should be denied, judgment absolute might be rendered against the appellants. This stipulation waived no legal objection which might exist to the counterclaim, and no immunity of the state from an affirmative judgment against it. It authorized the court to render only such judgment as it was justified by law in rendering, and had power to pronounce. It simply waived a new trial and rested the plaintiff's case upon the question whether the judgment of the referee should be sustained, or whether it was properly reversed by the general term. If the reversal was sustained, it was made absolute, and ended the case so far as the right of the plaintiff was concerned. The question of the right of the defendants to go further, and obtain judgment on their counterclaim against the state, was left for the court to determine, and was not effected by the stipulation.

It was held, in *People v. Denison*, *ante*, that, where an order granting a new trial to the defendant is affirmed in the court of appeals, such affirmance and the direction for judgment absolute upon the right of the appellant, without any further or other direction, do not authorize the clerk of the county, in which judgment is to be entered, to include therein a demand made against the plaintiff for an independent claim, when the right thereto has never been adjudicated in his favor, and when no judgment, which has been rendered, necessarily involves its merits.

In *Rust v. Hauselt*, 8 Abb. N. C. 148, it was held that the defendant cannot stipulate that judgment absolute shall be rendered against him, and under such a judgment still enter an affirmative judgment for all that he originally claimed.

Any right which he had to the affirmative relief claimed in his answer was lost by the judgment of the court of appeals on his stipulation, so that, when the case came back to the court below, it stands in the same position as though there had been no answer interposed—at any rate, no answer asking for affirmative relief.

Nor does the defendant acquire any new rights by reason of the matter being sent to a referee. The referee is simply to perform an act for the court, mainly ministerial, whereupon it becomes the duty

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of the court to enter a final judgment in conformity to the decision of the court of appeals.

There cannot be such a thing as a judgment absolute for the plaintiff, and a finding for defendant of a larger balance due him. See *Shufelt v. Rowley*, 4 Cow. 58.

The rendering of an affirmative judgment in favor of a party who has stipulated that judgment absolute shall be rendered against him, is quite as improper as to render judgment in his favor for what his pleadings did not claim.

In *Thompson v. Lumley*, 7 Daly, 74, the complaint, in an action for malicious prosecution, was dismissed at the trial. The general term reversed the judgment and ordered a new trial. The court of appeals affirmed the order, and ordered judgment absolute for the plaintiff, upon the usual stipulation. The case came back to the common pleas and damages were assessed by a judge and petit jury. A motion was made to vacate the assessment of damages, which was denied and an appeal taken, from the order denying this motion, to the general term of the common pleas. It was there held that the effect of the judgment of the court of appeals was the same as though the whole of the plaintiff's cause of action had been admitted. It was equivalent to an admission, by a failure to put in an answer, that the defendants had, maliciously, and without probable cause, caused the plaintiff to be arrested, imprisoned and prosecuted upon a charge of perjury. But the amount paid for counsel fees and costs the plaintiff had to prove upon the assessment, for this was in no way settled by the judgment of the court of appeals. As respects the assessment of damages in such a case, it is to be regarded as analogous to a default upon a failure to answer, and to be governed by the practice which exists upon assessing damages upon an inquest at the circuit, or upon a writ of inquiry before a sheriff's jury.

In *O'Donnell v. Hecker*, 3 How. N. S. 384, it was held that, where in an action for negligence in which the damages are unliquidated, the complaint is dismissed, and upon appeal the judgment of dismissal is reversed, and upon a further appeal by the defendant from the order granting a new trial, judgment absolute for the plaintiff is ordered upon defendant's stipulation, the case should be remanded to the trial court, and an assessment of damages made at trial term thereof before a jury; and the court cited, in support of this principle, *Ellsworth v. Thompson*, 13 Wend. 658; *Tillotson v. Cheetham*, 2 Johns. 107; *Dillaye v. Hart*, 8 Abb. 394; *Peck v. Corning*, 2 How. 84; *Cazneau v. Bryant*, 6 Duer, 668; 4 Abb. 402; *Hays v. Berryman*, 2 Bosw. 679; *George v. Fish*, 3 Robt. 710; *Thompson v. Lumley*, 7 Daly, 74.

In *Saling v. The German Savings Bank* N. Y. Com. Pl, February 3, 1890, an action was commenced in the city court and on the trial re-

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sulted in a dismissal of the complaint. An appeal was taken from this judgment to the general term of that court and resulted in a reversal of the judgment and in ordering a new trial. From this order an appeal was taken by the defendant to the general term of the common pleas, and in such appeal he stipulated as follows: "And the defendant and appellant hereby assents that if the said order of reversal so appealed from be affirmed, judgment absolute shall be rendered against defendant and appellant." And it was held that the giving of such a stipulation precluded an appeal to the court of appeals. See *Gordon v. Hartman*, 79 N. Y. 221.

Final judgment at General Term.—In *Guernsey v. Miller*, 80 N. Y. 181, it was held that, where it cannot be said that upon a new trial the case will remain unaltered, and the facts are not undisputed and it does not appear that the respondent is entitled to judgment in his favor, as matter of law, the issues made by the respective parties should be sent back to the trial court for its determination. See *Astor v. L'Amoureux*, 8 N. Y. 107. It is not sufficient that it is improbable that the defeated party can succeed upon the new trial; it must appear that he cannot succeed, to justify an appellate court in rendering final judgment against him. *Foot v. The Aetna Life Ins. Co.*, 61 N. Y. 571; *Arthur v. Griswold*, 54 Id. 400.

In *Enrichs v. De Mills*, 75 N. Y. 370, an action was tried without a jury; the facts were all found without apparent exception or error; the trial court drew from them the legal inference of a judgment for the defendant; the general term on the contrary drew an opposite conclusion from the facts found and ordered judgment for the plaintiff; and on appeal to the court of appeals, this court, while justifying the reversal, determined that a new trial should have been ordered, and that the rendition of final judgment was a mistake. It was contended that the rule had already been declared to be that, where the facts were found by the trial court without exception or error in the process of their determination, and so the only open question was as to the legal inference to be drawn, the appellate court might draw that inference and render judgment accordingly. But the court of appeals held that in such a case it could not know that there had not been exceptions or asserted errors in the process of finding the facts, since the respondent, not having appealed, was under no obligation to procure their appearance upon the record, and might very well have deemed their presence immaterial for any legitimate purpose of the appeal. And the rule was declared to be that, wherever the character of the issues framed by the pleading was such that upon a new trial it will be possible for the defeated party to recover, such new trial shall be awarded.

In *Thomas v. The N. Y. Life Ins. Co.*, 99 N. Y. 250, it was held that, where on appeal from a judgment, in an action tried by the court, no

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exceptions appear to the findings of fact, or error in their determination, but the general term draws a different legal conclusion therefrom than that of the trial court, this does not authorize it to render a final judgment in accordance with its own conclusion. Whenever the character of the issues framed by the pleading is such that, upon a new trial, it will be possible for the respondent to recover, a new trial should be ordered. Having succeeded on the trial, he is not required to procure the appearance of exceptions upon the record, and so the appellate court cannot determine that there were no exceptions or errors.

Opinion of the Court, by FINCH, J.

GEORGE R. ALEXANDER, Appellant, v. SAMUEL E. ALEXANDER, Respondent.

Court of Appeals, January 18, 1887.

Reversing same case, 41 Hun, Mem.; 1 N. Y. St. Rep. 510.

Appeal. Waiver—A party, who after bringing an appeal, accepts the benefit of the judgment appealed from, thereby waives his appeal, and an order of the general term, denying a motion to dismiss the appeal, to that court, will in such case be reversed.
See note at end of case.

Josiah T. Marion, for appellant,

Nathaniel C. Moak and *David F. Manning*, for respondent,

FINCH, J.—The motion to dismiss this appeal is founded upon the fact that the appellant, who was defendant in an action of partition, and by the judgment rendered was awarded a proportion of the proceeds resulting from a sale ordered by the court, accepted those proceeds after his appeal was perfected, and took also the costs allowed to him by the judgment. His notice of appeal was served March 13, 1886, and the referee appointed to make the sale, swears that he paid the share awarded to the defendant by two checks, dated respectively the seventeenth and twenty-fourth of the following April, both of which have been paid by the bank upon the defendant's indorsement. It is not denied that he could not be permitted at the same time to take the fruit of the judgment, and appeal from it as erroneous or wrong; but it is contended in the present case that no such inconsistency exists, because the whole controversy concerns a fund other than the residue, a share of which the

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defendant accepted ; or, in substance, that what the defendant took he would be entitled to retain in any conceivable disposition of the case. *Clowes v. Dickenson*, 8 Cow. 328 ; in *Knapp v. Brown*, 45 N. Y. 207. We are not able to concur in a view of the situation which would make those authorities applicable. The litigation involved a question of advancements. The court found that \$57,500 had been advanced to the defendant, and \$15,000 to the plaintiff, and awarded to the latter the difference of \$42,500, to be first paid out of the proceeds of sale for equality of partition dividing the residue equally between the two parties. The defendant's notice of appeal is from the interlocutory and the final judgment, and not from any alleged separable or independent portion which left the rest unaffected and unassailed. So far as the division of proceeds is concerned, we cannot discover any such separable or independent portion to which the appeal could have been limited. The amount of residue must necessarily depend upon the amount of the advancements adjudged to have been made. Those to the defendant are alleged in the complaint to have consisted of certain parcels of real estate, the value of which is not stated, and which value necessarily became the subject of proof. If the judgment should be reversed, the plaintiff, on a new trial, will be at liberty to show, and may possibly establish, that such value was greater than the \$57,500, or that the advancements to himself were less than the \$15,000 and in either event the sum first payable to him from the proceeds would be increased, and, as a consequence, defendant's share of the residue lessened. He stands thus in the attitude of holding the fruit of the judgment to which he may not be entitled if his appeal succeeds, and yet persisting in his appeal. The trouble is that he cannot gain the right to recover more without incurring the hazard of recovering less.

But it is further insisted that he took his share of the residue with the plaintiff's consent and under an arrangement

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which nevertheless contemplated the prosecution of the appeal. The proof of this is sought to be deduced from an affidavit of the defendant's attorney. He swears that, just before the entry of judgment, he declared his client's purpose to appeal, and thereupon, the plaintiff's attorney expressing a desire not to have proceedings stayed, and to be at liberty to collect and receive the sum awarded, it was finally agreed that he might do so upon assigning to the referee in trust a mortgage as security for any restitution which might be ordered. That assignment and a covenant of restitution were executed April 1, 1886, and after the appeal had been taken. The affidavit further showed that the plaintiffs' attorney frequently said that there was no need of tying up the proceeds of the sale, but that a speedy sale and distribution were desirable. It is to be noticed that the affidavit asserts no negotiations except as to the right of the plaintiff to get his money, and to prevent a stay, which would hinder that result, and does not claim that anything was said, or any agreement made, relating to the share awarded to the defendant. It shows only that the plaintiff wanted his money; that he could not get it if the defendant on his appeal effected a stay of proceedings; that security was given to obviate the need of that stay; and what was said about not tying up proceeds and expediting the appeal naturally referred to that negotiation, and related to that effort. The defendant's silence as to his own share is made more emphatic by the affidavit of the plaintiff's attorney that he never uttered a word about defendant's treatment of the residue awarded to him, or in any manner recognized the appeal after that share was accepted. It is not possible to infer a consent or waiver. The defendant does not claim that his act was inadvertent, and without consciousness of the question it might raise. If he did that, and offered to restore the money received to its official custodian pending the appeal, the question would assume a more hopeful shape. But he stood and stands here upon his right. While we

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cannot help thinking that some misunderstanding has existed, and should be glad to sustain the appeal taken, we can find no just ground upon which to rest such a decision.

The order of the general term should be reversed, and the appeal dismissed, with costs.

All concur.

NOTE ON WAIVER OF THE RIGHT OF APPEAL.

The right to appeal, before an appeal is taken, and the appeal, after it is taken, may be waived, by the appellant, by his acts as well as by his stipulation. What has been held to amount to such waiver by the appellate courts will be seen by an examination of the comments on the authorities cited in this note.

Waiver by accepting a benefit.—In *Grunberg v. Blumenthal*, 66 How. 62, it was held to be the settled rule of practice that, if a party proceeds under an order, or accepts any benefit thereunder, it is a waiver on his part of the right of appeal; and if, after taking an appeal, he proceeds under the order appealed from, or accepts any benefit thereunder, he in like manner waives his appeal. He must be consistent and stand by the position he elects to take. He must rely upon his appeal, or abandon his right to it and act under the order, but he cannot do both. He is not permitted to test the accuracy of the order by an appeal, and at the same time accept any benefit which the order confers. If he seeks by appeal to reverse the order of the court, he must, in case he succeeds, leave the adverse party in the same position he was when the order appealed from was made; and if, by any affirmative act of his, the position of the adverse party has been changed he cannot insist upon an appeal from the order previously made. See *Brady v. Donnelly*, 1 N. Y. 126; *Noble v. Prescott*, 4 E. D. S. 139; *Ursdell v. Root*, 3 Abb. 149; *Clark v. Melggs*, 10. Bosw. 337; *Radway v. Graham*, 4 Abb. 468; *Lapton v. Jewett*, 19 Id. 320; *Lewis v. Irving Ins. Co.*, Id. 140, note; *Marvin v. Marvin*, 11 Abb. N. S. 97; *Platz v. City of Cohoes*, 8 Abb. N. C. 392.

In *Cornell v. Donovan*, N. Y. C. P., December 5, 1887, it was held that if an appellant seeks to reverse a judgment, he must abstain from enforcing those parts of it that are in his favor, if they are so connected with, or so dependent upon, the parts that he assails that they ought all to stand or fall together. See *McNamara v. The Canada Steam Ship Co.*, 11 Daly, 297; *Knapp v. Brown*, 45 N. Y. 210; *Barker v. White*, 58 Id. 211; *Matter of the N. Y. C. R. R. Co.*, 60 Id. 117.

In *Murphy v. Spaulding*, 46 N. Y. 556, plaintiff in an action upon a

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contract for the sale of lands, demanded judgment for a specific performance; or, in case a conveyance was impracticable, damages for non-performance. The referee decided that he was not entitled to a conveyance, and gave him damages for the non-performance. The defendant, to whom the lands in question had been conveyed, entered as much of the judgment as denied a specific performance, and plaintiff entered the portion in his favor, and appealed from the former part. And it was held that the provisions of the judgment were so connected and dependent, that the part appealed from should not be reversed without a reversal of the other part; and that plaintiff's entry of the part of the judgment in his favor, and taking no appeal therefrom, gave the court no authority to reverse it, was an election to accept it, and a waiver of his right to appeal.

In the Matter of the N. Y. J. & W. Ry. Co., 44 Hun, 275, the Lackawanna company instituted proceedings to acquire a crossing over the Erie railroad, commissioners were duly appointed, and a report made fixing and determining the mode and place of such crossing, and requiring the said company to construct certain bridging on its route. Said report was confirmed by the special term, and its order of confirmation was affirmed by the general term and by the court of appeals, on an appeal by the Erie company. Meanwhile, the Lackawanna company built its road over the Erie railroad and was running its road, but neglected to do the bridging required by said report and order. Thereafter, the said Lackawanna company took an appeal from those portions of said order, so made and confirmed at its instance, relating to bridging and water-ways for the protection of the Erie company's roadway. The Erie company made a motion to dismiss such appeal. And it was held that the said appeal will not and ought not to lie, since the order was entered upon the appellant's own motion and for its own benefit. Especially does this seem unreasonable, when the appellant avails itself of such order and has built its road and is running its trains by its authority.

And further, since the report and order, prescribing the terms and conditions of the crossing, constitute a complete disposition of the whole controversy, giving benefits to the Lackawanna, which they are enjoying, and providing adequate and necessary protection for the Erie, it ought not to be possible that such a report can be appealed from, in fragments, so that the benefits may be retained and the protection be withdrawn. Each part of the report is dependent upon the other parts, and the report of the commissioners would be very different, if a part only was allowed to stand. It is not possible that justice would permit the reversal of the part of the order appealed from and allowed the other parts to exist.

In *Canary v. Knowles*, 41 Hun, 542, plaintiff procured an order of

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injunction forbidding the defendants to allow any person other than the plaintiff to occupy, for dramatic purposes, a certain building for a certain period, and requiring the defendant to show cause, at a certain time and place, why the injunction should not be continued during the pendency of the action. At the time specified, an order was made continuing and making permanent the injunction, but with the following proviso, that, in case the defendant shall serve a written stipulation, that the damages to be recovered by the plaintiff in this action shall be \$2,000 etc.; that upon the service of such stipulation, the injunction hereby granted shall thereupon be dissolved. The defendants executed and served the stipulation, and the injunction was dissolved. The defendants afterward appealed from the order, and every part of it, to the general term. And it was held that, by serving the stipulation and accepting the benefit in such case conferred by the order, the defendants waived their right to appeal from the order. The proviso of the order was a favor to the defendants. It put it within their power to obtain what, in showing cause, they were seeking to obtain, i. e., a dissolution of the injunction. The action on their part was inconsistent with their right to appeal. They made the plaintiff's situation less favorable than it was when the order appealed from was made. The service of a notice of protest with the stipulation did not prevent their action operating as a waiver.

In *People ex rel. Garbutt v. The Rochester and State Line R. R. Co.*, 15 Hun, 188, an order was granted directing a peremptory mandamus to issue, commanding the company, and the other defendants composing its board of directors, to construct fences and cattle guards on the line of its road. The company and one other defendant appeared on the hearing of the motion for the order and asked to have the motion stand over until the next special term. In the order for the mandamus, a clause was inserted giving the defendants time, until a day certain, to comply with the requirements of the writ. The order was so framed as to comply with the defendants' request. They afterward appealed from the order granting the mandamus, and it was held that the appeal should be dismissed, on the ground that the defendants, having secured and enjoyed a favor granted them by the order, cannot now be heard to complain of it.

In *Alexander v. Alexander* reported above, the defendant in an action of partition was by the judgment rendered therein, awarded a proportion of the proceeds resulting from a sale ordered by the court, and accepted those proceeds after his appeal was perfected, and took also the costs allowed to him by the judgment. The litigation between the parties involved a question of advancements. The trial court found that \$57,500 had been advanced to the defendant and \$15,000 to the plaintiff; and awarded to the latter the difference

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of \$42,500, to be first paid out of the proceeds of sale for equality of partition, dividing the residue equally between the two parties. The defendant's appeal was from the interlocutory and the final judgment, and not from any alleged or independent portion which left the rest unaffected and unassailed. The plaintiff moved to dismiss the appeal, which was denied; an appeal was taken from this order. And it was held that a party cannot be permitted at the same time to take the fruit of the judgment, and appeal from it as erroneous or wrong; and that when, after an appeal has been brought, he thus accepts the benefit of the judgment, he thereby waives the appeal.

If the defendant claimed that his act was inadvertent and without consciousness of the question it might raise, and offered to restore the money received to its official custodian, pending the appeal, the question would assume a different aspect.

In *Genet v. Davenport*, 59 N. Y. 648, a judgment was entered upon the report of a referee, and plaintiff appealed from this judgment. The general term modified the judgment, vacating a part and affirming the judgment as modified; and judgment in accordance therewith was perfected on motion of plaintiff's attorney. The defendant appealed to the court of appeals from the modification, and the appeal was contested by the plaintiff and the judgment affirmed. Upon the sending down of the remittitur, the decision of the court of appeals was, on motion of plaintiff's attorney, made the judgment of the court below. Plaintiff's attorney, who had become assignee of the judgment, then took an appeal to the court of appeals from the whole judgment. And it was held that plaintiff, by his acts, had elected to abide by the judgment of the general term, and had waived his right to appeal.

By accepting costs, etc.—In *Platz v. City of Cohoes*, *ante*, the verdict was set aside and a new trial granted, upon the payment of \$75 to the defendant. In accordance with this order, the plaintiff paid these costs, which were received by the defendant's attorney, who, upon consulting with the counsel in the case, immediately offered to return the money, which the plaintiff's attorney refused to accept. The defendant appealed from the order granting a new trial, and the plaintiff moved to dismiss the appeal. And it was held that the defendant, by accepting costs awarded by an order, waived the right to appeal therefrom, though its attorney subsequently offered to return them. The defendant, while admitting the general rule, that if a party accepts the benefit of an order, he waives the right to appeal therefrom, insists that, in the present case, the money paid for costs was received by mistake, and that the appeal should not be dismissed.

If, by any fraud or stratagem, the defendant's attorney had been induced to take these costs, not knowing what they were for, he might

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repudiate his act and return them; but he cannot do so, when he understands the order, and did not act under a mistake of fact or law in accepting the costs, but was aware of the rule that acceptance of the costs would prevent an appeal.

In *Matter of Baber*, Supm. Ct. Second Dept. December 14, 1886, a debtor made an assignment for the benefit of creditors. The assignee subsequently filed an account of his proceedings, and the assignor filed objections and contested said account. Upon the settlement of the decree, the assignor insisted that he should be allowed \$200 for his costs, and that the residue of the amount of increase should be applied to the payment of his indebtedness to the first preferred creditor who was not paid in full. This was done at his request, and the amount of costs awarded him was paid to his attorney. He subsequently appealed from the whole of such decree, and the respondent moved to dismiss such appeal. And it was held that, by taking the benefit of the decree he waived an appeal therefrom. A party cannot accept the benefit of an order or judgment and then appeal from such portions as are unfavorable to him; See *Carll v. Oakley*, 97 N. Y. 633; *Bennett v. Van Syckel*, 18 Id. 481, unless the receipt of the benefit under the judgment is not inconsistent with the appeal; as when the provisions of the decree are not connected and dependent, and the appellant can establish a right to a larger sum without reversing the entire judgment. *Knapp v. Brown*, *ante*.

In *Bambman v. Schulting*, 6 Hun, 29, an order was made that the plaintiff have leave to discontinue this action, upon payment to the defendant of taxed costs, and the sum of \$100 granted as an extra allowance. He paid the costs and allowance and availed himself of the leave to discontinue which the order gave upon the condition of payment; but he claimed that he paid the \$100 under protest. He subsequently appealed from so much of the order as awards the allowance of \$100 to the defendant. And it was held that he could not avail himself of the benefits of the order, without complying with its conditions, and that his compliance with such conditions was a waiver of his right to appeal. If he desired to review the question as to the allowance, he should have refrained from availing himself of the conditional leave given, by paying the costs and allowance imposed, until he should bring the question before the general term by appeal.

In *Marvin v. Marvin*, *ante*, upon an appeal to the supreme court from the order of the surrogate, the appellant gave a bond in the alternative, to the people or to the respondent, which was not such a bond as the statute requires. The respondent moved to dismiss the appeal, and the motion was granted, on condition that the respondent should, within ten days, file with the clerk of the court a stipulation that the

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decree appealed from be modified by striking out all relating to the inventory, and that he should pay ten dollars costs of the motion. The respondent made the requisite stipulation, and paid the costs, which were accepted by the executor. He afterwards appealed to the court of appeals. And it was held that the acceptance of these costs by the executor was a waiver of his right to appeal from the order.

In *Caril v. Oakley*, *ante*, an action was brought by a judgment creditor of an insolvent corporation to wind up its affairs, and judgments were directed against the stockholders, and among them judgment was so directed and entered against the appellants and costs were allowed to their attorney. The appellants appealed from the judgment against them; the appeal was withdrawn, and thereafter the costs of their attorney were paid to and accepted by him. Subsequently, another appeal was brought which was dismissed by the general term. From the order of dismissal, an appeal to the court of appeals was taken. And it was held that the acceptance by the defendants' attorney of costs in the action, after the withdrawal of the first appeal, was a good answer to the second appeal, and that by accepting a benefit under the judgment they precluded themselves from subsequently appealing therefrom. See *Bennett v. Van Syckel*, *ante*; *Radway v. Graham*, 4 Abb. 468.

In *Knapp v. Brown*, *ante*, the appellant issued an execution upon a judgment rendered in his favor, and collected the amount thereof after bringing an appeal therefrom, and it was held to be inconsistent with, and a waiver of, his right further to prosecute the appeal. By issuing the execution, he enforced the judgment as a valid judgment and secured to himself the fruits thereof as such. By the appeal, he seeks wholly to reverse and annul the judgment for error therein. These acts are wholly inconsistent, the one with the other, and upon principle, it is clear that the same party cannot pursue both remedies.

By pleading.—In *Mayor, etc., of the City of New York v. Kent*, 56 Supr. Ct. 133, the defendant's counsel on the trial objected to the introduction of certain evidence on the ground that it varied the contract alleged in the complaint. Plaintiff's counsel then asked to be permitted to amend the complaint so that it should conform to the facts, which motion was granted; and he consented to serve an amended complaint upon the defendants within three days and defendant's counsel consented to serve an answer within ten days thereafter, and all this was embodied in an order subsequently duly entered. Subsequently the plaintiffs served an amended complaint, and defendants answered, and plaintiffs thereupon noticed the new issue for trial. After granting the order allowing the amendment, the court dismissed the complaint as to one of the defendants without objection and before the service of the amended papers. And it was held, on appeal to the general term,

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that the plaintiff's right of appeal from said judgment of dismissal, if any ever existed, was waived.

In *Hood v. Hood*, 43 Hun, 638, defendant demurred to the complaint on the ground, among others, that the plaintiff had not legal capacity to sue. The demurrer was sustained, and the plaintiff permitted to amend the summons and complaint upon payment of costs. The defendant appealed from so much of the order as allowed the amendment, and the plaintiff prepared his amended complaint and duly served it upon the defendant, at the same time giving him a check for the cost. The amended complaint and check were accepted and retained, and the defendant's attorney thereafter joined issue upon the amended complaint by serving his answer. And it was held that, under this state of facts, the appeal ought to be dismissed. By accepting the amended complaint and check, the defendant waived his right to prosecute his appeal. He had a right to appeal from so much of the order as allowed the amendment, but he had no right, at the same time, to accept the benefit which was made a condition of granting that part of the order. The plaintiff had a right either to make the amendment or retain his money; the defendant has deprived him of doing the latter, and this appeal seeks to deprive him of the former, privilege.

In *Negley v. Short*, City Court of New York, December 2, 1889, a judgment was entered upon the default of defendant, and an order made, opening the default, and permitting the defendant to come in and defend on the merits upon the payment, within three days after service of the order, of the costs and disbursements included in the judgment, and upon the service of his answer at the same time. The defendant paid the costs and served his answer in compliance with the order, and afterwards appealed therefrom. And it was held that, by submitting to the terms of the order, he waived his appeal. See *Grunberg v. Blumenthal*, *ante*. The case of *Hays v. Nourse*, 107 N. Y. 577 has no application. The appellant, having availed himself of the favor extended, cannot be heard upon appeal in opposition thereto.

In *The Sixth Ave. R. R. Co. v. The Manhattan Ry. Co.*, 54 Supr. Ct. 323, it was held that the service of an answer to a complaint is a waiver of an appeal taken from the denial of a motion made before service of the answer, to compel a separate statement of several causes of action claimed by defendant to be set up in the complaint.

In *Porter v. Farmlly*, 6 J. & Sp. 490, a party was held to waive his right of appeal from an order of reference by going to trial before a referee and taking exceptions to his report.

In *Brady v. Donnelly*, *ante*, the defendant put in a demurrer to a bill in equity, which was overruled, and on appeal to the chancellor, the order was affirmed. The defendant then appealed to the court

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of appeals, and afterwards answered the bill. And it was held that, by answering, the appeal was waived.

By stipulation.—In *Saling v. The German Savings Bank*, New York Common Pleas, February 3, 1890, an action was commenced in the city court and resulted, on the trial, in a dismissal of the complaint. An appeal was taken from this judgment to the general term of that court and resulted in a reversal of the judgment and in ordering a new trial. From this order, an appeal was taken by the defendant to the common pleas, and in such appeal, the defendant stipulated as follows: "And the defendant and appellant hereby assents that, if the said order of reversal so appealed from be affirmed, judgment absolute shall be rendered against defendant and appellant." A motion was made for leave to appeal to the court of appeals, and it was held that the giving of such a stipulation precluded such appeal.

In *Smith v. Grant*, 11 N. Y. C. P. 354, the cause was placed on the day calender, and on the day specified the defendant appeared and moved that the cause be adjourned till the next term. The motion was denied, but the cause was adjourned for one week, upon the condition that the cause be tried on that day, and that the examination of the absent witness be taken by an open or closed commission at defendant's option, to the issuing of which commission the plaintiff was required to consent, and that an inquest, if taken, should be final. To all these terms and conditions the parties assented, and the order was entered to that effect. The defendant subsequently appealed from the order directing the postponement. And it was held that the court could not review the part of the order granting an adjournment of the trial, as it was made on the defendant's application. It was, as far as it went, a decision in the defendant's favor, and, as a consequence, he cannot complain of it. And it was further held that the court could not review the part of such order imposing stringent terms and conditions on the defendant, as it was assented to by the defendant, and provisions, inserted in an order by the consent of the appealing party, cannot be reviewed.

In *Avery v. Woodin*, 44 Hun, 286, an action for partition was brought and a defendant who had appeared by attorney, but had not answered, appeared before the referee appointed to take proof of the rights, etc., and thereafter was heard upon a motion to confirm the referee's report, which was affirmed by an interlocutory judgment which directed a sale. After the sale had been made, a final judgment confirming the sale was entered, but this defendant did not appear at the hearing of the motion to confirm the referee's report of sale, but appealed from the final judgment. And it was held that the appeal should be dismissed, as the final judgment was entered upon the default of the defendant

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within the meaning of that term as used in §1294 of the Code of Civil procedure.

By renewing application.—In *Noble v. Prescott*, 4 E. D. S. 139, it was held that a party cannot appeal from the order denying his former motion where he avails himself of the right to renew his application.

In *Egbert v. O'Connor*, 14 J. & Sp. 194, it was held that a party will waive his right of appeal from an interlocutory order, by accepting the terms of a subsequent order, inconsistent with it.

In *Harris v. Brown*, 93 N. Y. 390, a motion was made by defendant to vacate an order of arrest, and this motion was denied. The defendant renewed the motion to vacate upon further affidavits, and appeal from the order denying his former motion to vacate. And it was held that there was a waiver of the right to appeal from the first order denying the motion, by making the second motion upon additional papers. The rule, that to constitute a waiver of the right to appeal, some benefit should have been received, cannot be invoked, where the defendant has renewed his motion to vacate after appealing from the first order denying such motion. He has abandoned his first motion, and placed the case in a position where the merits of the motion cannot be disposed of on the first order, for the reason that, upon the second application, a state of facts may have been presented which would sustain the order of arrest, though the original papers may have been defective.

No waiver. Accepting part of a judgment or order.—In *Hyatt v. Ingalls*, 49 Super. Ct., 375, the judgment, in an action to enforce forfeiture of plaintiff's license to defendant to manufacture patent articles, declared the license forfeited, directed an accounting and enjoined further violations of the contract. The defendant accepted that part of the judgment which directed the cancellation of the license, but appealed from the remaining portion. And it was held that, by such acceptance, he did not waive his right to so appeal.

In *Wallace & Sons v. Castle*, 68 N. Y. 370, an attachment was issued against defendants as non-residents. On motion of defendant, the attachment was vacated on the defendants stipulating not to bring any action on the undertaking furnished, etc., on the issuing of said attachment, or on account thereof. Plaintiff appealed from so much of the order as vacated the attachment, and the order of the special term was reversed. The defendant then appealed from the order of the general term to the court of appeals, claiming that plaintiff, by appealing only from the portion of the order against it, accepted the portion inuring to its benefit, and so waived the right of appeal. And it was held that the rule invoked does not apply to a case of this character, but only to cases where the provisions of the judgment or order are such that the party, by not appealing from a part, enforces or ac-

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cepts a substantial benefit by reason of that portion of the order not appealed from. It does not appear that the stipulation provided for in the special term order, was tendered or accepted, and therefore, it is not apparent that any benefit was derived by the plaintiffs from the form of the notice of appeal.

In *Chapin v. Foster*, 101 N. Y. 1, no order of arrest was issued in the action, but an execution against the person of the defendant. The defendant moved to set aside the execution, and the special term denied the motion. On appeal to the general term, the order of the special term was reversed, and the defendant released from custody upon condition that the defendant should stipulate not to sue, etc. The defendant appealed from that portion of the order of the general term requiring him to so stipulate. And it was held that, so long as the defendant has not availed himself of the portion awarding costs, he has a right to appeal from the part thereof which is unsatisfactory to him. The case does not come within that class of cases, which hold that a party, who has availed himself of provisions in his favor, contained in an order, has thereby waived the right to appeal from other provisions therein which are adverse to him.

In the *Matter of The N. Y., W. S. & B. R. R. Co.*, 64 N. Y. 287, the defendant, under former proceedings, had obtained possession of certain lands under water in the Hudson River and begun the construction of an embankment; but these proceedings were subsequently annulled, and the present proceedings instituted. On application of the company, an order was granted, allowing it to continue in possession until the final conclusion of the new proceedings, but requiring it to keep open the gap in the embankment for the benefit of the land owners. The order confirming the commissioners' report provided that, on payment of the sum awarded, the company have full possession, and annulled all orders inconsistent with such possession. The company paid the awards and immediately closed up the gap. The company subsequently appealed from the order. And it was held that it had not waived its right of appeal; that independent of the order, the condemnation was complete and final, the company was entitled to take full possession, the owners were divested of all estate and interest, and nothing could be reviewed upon the appeal but the amount of the award; and therefore, the company did not avail itself of any benefit conferred by the order appealed from, which should preclude it from appealing.

In *Genet v. Davenport*, *ante*, an action was brought against two defendants whose liabilities were separate and distinct, or were upon two distinct subject-matters, and a several judgment was rendered in favor of one defendant and against the other, or in favor of

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plaintiff as to one subject matter and against him as to the other. An appeal was brought by the unsuccessful defendant to the court of appeals from the judgment against him and was determined by the appellate court. The plaintiff then appealed from the whole judgment of the supreme court, and the appeal was dismissed on the ground that it was too broad. The plaintiff again appealed from the whole of the judgment which was not modified or reversed by the general term. And it was held that the fact that an appeal had been brought by the unsuccessful defendant from the judgment against him and determined, while it estopped plaintiff from questioning that portion of the judgment, did not preclude him from appealing from the residue; and that the fact that two or more several judgments, entirely disconnected, are included in the same record, did not deprive the parties of the right to appeal from either within the time limited by law; nor did the determination of a prior appeal from one prevent an appeal from another of the judgments.

In *O'Brien v. Long*, 49 Hun, 80, a judgment was entered in plaintiff's favor for damages, with costs and referee's fees, the latter of which were paid by the plaintiff upon delivery of the report. The report and judgment were set aside, on motion of defendant, on condition that he pay to the plaintiff the costs of the trial, including the referee's fees. The defendant appealed from the portion of the order imposing terms. And it was held, on motion to dismiss the appeal, that the fact that the defendant accepted and acted upon the provisions of the order granting him relief did not prevent his appealing from the portions of the order imposing terms with which he was dissatisfied.

Accepting costs or amount of order or judgment.—In *Blenkard v. Babcock*, 2 Rob. 175; 17 Abb. 421, it was held that a plaintiff does not waive the right of appeal from a judgment in his favor, by an acceptance, when tendered by the defendant, of the amount of the verdict and costs included in the judgment.

A right of tender, intended merely to prevent interest and costs, should not be abused to compel the opposite party, either to abandon an appeal, or waive all claim to interest. There is no principle by which a party is to be absolutely barred from litigating his claim for a larger sum than that paid, merely because he accepts part, in order to prevent a loss of interest if he turns out to be wrong.

In *Schermerhorn v. Wheeler*, 5 Daly, 472, the payment of an entirely adverse judgment was held not to be a waiver of the right to appeal therefrom.

In *Hayes v. Nourse*, *ante*, judgment was recovered by the plaintiff from which the defendant took an appeal to the general term where the judgment was affirmed. The defendant voluntarily paid both the said judgments, received satisfaction pieces thereof, and caused said

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judgments to be satisfied of record. No process had been issued or proceeding taken to enforce payment of said judgments. Subsequently, the defendant appealed from the judgment of affirmance to the court of appeals, and the plaintiff moved to dismiss the appeal. And it was held that a party, against whom a judgment has been rendered, is not prevented from appealing by the fact that he has paid the judgment, unless such payment was by way of compromise, or with an agreement not to take or pursue an appeal.

In *Higbie v. Westlake*, 14 N. Y. 281, administrators, pursuant to the statute, applied to the surrogate for an order for the sale of their intestate's real estate, for the purpose of paying his debts, and obtained an order pursuant to which the lands of the deceased were sold, and the proceeds were brought into the surrogate's court for distribution. Such proceeds were on due notice distributed among the creditors of the intestate, and, among others, to the present respondents who appeared by counsel. After deducting the amount of the expenses, the balance of the proceeds of the sale, which was insufficient to pay all the debts, was distributed pro rata among the creditors. The present respondents received their dividends and gave receipts to the administrators, expressed to be on account, and then appealed to the general term of the supreme court. The judgment of this court modified the decree of the surrogate in certain particulars. The administrators and the widow of the intestate appealed from this judgment to the court of appeals. And it was held that a creditor may appeal from a decree of distribution made by a surrogate, notwithstanding he receives, on account of his demand, the amount awarded to him by it. The respondents in this case were certainly entitled to the amount paid them, and there was no inconsistency on their part in receiving that amount, and then appealing for the purpose of obtaining a reduction of the allowance for expenses, which would give them a further dividend.

In *Kennedy v. Wood*, 54 Hun, 14, an order was granted at the circuit, which imposed as a condition of postponement of the trial, the payment by the plaintiff of the sum of fifty dollars within five days, in default of which the complaint should be dismissed. Plaintiff paid the costs imposed, under a written protest, and reserving all rights. He afterwards appealed from the part of the order which imposed the terms and it was held that the right to such appeal was not waived by the fact that the aggrieved party, to prevent a dismissal of his complaint, has paid the illegal amount under protest. He could not do otherwise with safety to himself.

In *Champion v. The Plymouth Cong. Society*, 42 Barb. 441, the referee dismissed the complaint with costs, and the plaintiff voluntarily paid

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the costs upon bringing his appeal. And it was held that such voluntary payment of the costs, by the plaintiff, will not amount to a waiver of the right to appeal. The costs are a mere incident to the recovery; and notwithstanding they have been paid, the plaintiff has a right to have the decision of the referee on the merits reviewed.

In *Burch v. Newbury*, 4 How. 145, it was held that, where the collection of costs is coerced, it does not deprive the party of his right of appeal.

In *Dyett v. Pendleton*, 8 Cow. 325, the defendant, against whom a judgment was rendered, sued out a writ of error thereon to the court for the correction of errors, but failed to put in the requisite bail for staying the collection of the judgment. The plaintiff issued an execution upon which the defendant gave additional security for its payment; and thereupon the defendant in error moved for a dismissal of the writ of error. And the court denied the motion and held that the act of the defendant in error in enforcing the judgment was no bar to the right of the plaintiff in error to prosecute his writ.

In *Clewes v. Dickinson*, 8 Cow. 328, an appeal was taken by a party from a decree in chancery awarding him a specified sum of money, who had demanded and received payment from the opposite parties and afterwards appealed from the decree. A motion to dismiss the appeal was denied by the court; but the appellant did not seek, by his appeal, to obtain a reversal of the decree, but its modification, so as to award him a larger sum. Thus, in any event, he was entitled to retain the sum received, and the only question that could arise upon the appeal was whether he was not entitled to recover more. His act, therefore, in demanding and receiving payment of the judgment was not inconsistent with his appeal.

In *The Matter of Water Com'rs*, 36 Hun, 534, an order was granted on the application of the commissioners, giving them leave to amend their petition, and, by an independent provision therein, ten dollars costs of the motion were awarded to the respondents, not as a condition to the granting of the motion, but absolutely. The costs were tendered to, and accepted by, the appellants, after which they took an appeal from the order. A motion was made to dismiss the appeal, on the ground that the acceptance of such costs operated as a waiver of the right to appeal.

It is the general rule that a party cannot take the benefits of an order and at the same time have an appeal therefrom. See *Platz v. City of Cohoes*, *ante*. But this rule invariably applies, when the benefits or advantages are conditional, or are connected with, or are made in some manner dependent upon, other provisions to which objection is urged by the appeal. See *Bennett v. Van Syckel*, *ante*; *Knapp v.*

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Brown, *ante*; Genet v. Davenport, *ante*; Murphy v. Spaulding, *ante*.

To make the acceptance of a benefit under an order operate as a waiver of the right of appeal, there must be an inconsistency in retaining such benefit and at the same time appealing from the order. *Matter of Water Com'rs, ante*; Knapp v. Brown, *ante*; Benkhard v. Babcock, 27 How. 391.

This doctrine of waiver is to be applied in those cases only, where the appellant has attempted to enforce the order in his favor, or some part thereof, connected with or dependent upon some other part, which he seeks to avoid by his appeal, or has accepted a benefit having such connection or dependency. *Matter of Water Com'rs, ante*.

In the latter case, the provision in the order awarding costs is entirely independent of, and has no connection whatever with, the part of it challenged by the appeal. There is no inconsistency, therefore, in taking the costs awarded by the order, and yet insisting upon the impropriety of the other independent provisions.

Proceeding under order or judgment. In *Barker v. White, ante*, an interlocutory judgment was entered directing a reference and an accounting. The defendant appeared before the referee and presented his claims, supported the same by proof and contested the claims of the opposing party. And it was held that the defendant did not thereby waive his right to move for a new trial or to appeal to the court of appeals from an order denying such motion. While the proceedings in the cause were progressing, the defendant had the right to take such steps as would protect his interests as far as might be, and secure the most favorable final decree, in case the decision of the referee against him on the merits should be sustained. He was not bound to let the opportunity pass to put in his claims against the fund, in accordance with the interlocutory decree, under the penalty of forfeiting the right, which the law awarded him, of seeking a review of the main questions in the case. The authorities which show that one, who enforces a right conferred upon him by a judgment or order cannot, at the same time, prosecute an appeal from it, do not sustain the motion in this case to dismiss the appeal. In the leading case on the subject, *Bennett v. Van Syckel, ante*, the defendant was adjudged to hold in trust an estate for years, which he had taken in his own name and claimed in his own right, and the decree provided for indemnifying him against his personal covenants contained in the lease, and for refunding to him rent and taxes which he had paid; and to this end the judgment required the plaintiff to pay into court the amount of the rent and taxes, and to file a bond of indemnity against the covenants. The defendant made application to the court and obtained an order for the payment to him of a portion of these moneys, and also, by leave of

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the court, brought an action on the bond of indemnity. And it was held that these acts were a waiver of his right to appeal from the judgment. He had enforced those provisions of the judgment which were in his favor, and this course was clearly inconsistent with the right to prosecute an appeal which, if successful, must result in the reversal of the entire judgment.

But in *Barker v. White*, *ante*, the appellant, while denying the right of the respondent to a sale of the land, and claiming to hold it as an heir at law of his father, has, simply, in an interlocutory proceeding, sought to establish claims which he desires allowed to him in the final decree, should the right of the plaintiffs be ultimately sustained. This he had a right to do without abandoning his defense upon the main questions in controversy. If any of his claims had been allowed, and the decree authorized the enforcement of them against the plaintiffs personally, or against any fund paid into court by them under the decree, and the plaintiff had enforced his claims under the decree, the case would have fallen within the principle upon which *Bennett v. Van Syckel*, *ante*, was decided.

In *Pistor v. Hatfield*, 46 N. Y. 249, the plaintiff demurred to two counts of defendants' answer. The demurrer was sustained, and from this order defendants appealed, but without giving security or obtaining a stay. Plaintiff thereupon noticed the cause, took an inquest at the circuit, and perfected judgment, which was, upon defendant's motion, set aside. From this order, plaintiff appealed, and the defendants moved to dismiss the appeal upon the ground, among others, that the plaintiff had waived his appeal by appearing, and without objection, arguing the appeal from the order sustaining the demurrer. The appeal was dismissed. From the order of dismissal, an appeal was brought to the court of appeals. And it was held that the plaintiff's appearance and argument of the appeal from the order sustaining the demurrer, were no waiver of the appeal from the order setting aside the inquest and judgment.

An appeal from a judgment or order, or the right to appeal therefrom, is waived by the party, seeking to prosecute the appeal, having availed himself of a benefit given to him by the judgment or order, or proceeding in the cause, upon the assumption of the validity thereof. But in this case the appellant has done neither. The appearing at the general term and resisting the reversal of the special term order, sustaining his demurrer to the answer, did not assume the validity of the order setting aside the judgment. It had no connection with, or dependence upon, that order.

In *Gallagher v. O'Neill*, City Court of New York, December 27, 1888, upon the conclusion of defendant's examination in supplementary proceedings, an order was made appointing a receiver, and directing the

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defendant to deliver to him all his property. The receiver made demand upon the defendant to deliver in accordance with this provision, and, upon the defendant's failure so to do, moved to punish him for contempt. The court, at special term, made an order adjudging the defendant in contempt, and he was imprisoned under the commitment issued on this order, and obtained his liberty under a writ of habeas corpus. An appeal was taken by the defendant from the order for his commitment. And it was held that, though he was secure against further proceedings under the illegal order appealed from, without prosecuting this appeal, this circumstance did not prevent him from having his appeal heard and considered by the general term.

In *Matter of the N. Y. C. & H. R. R. Co.*, 60 N. Y. 112, an order appointing commissioners in proceedings by a railroad company, under the general railroad act to acquire title to lands, was granted. A land-owner appealed from the order, and a motion to dismiss the appeal was made. Before the appeal was taken, the commissioners made their report, and a copy thereof, reciting the granting of the order, was served on the owner, who appeared and opposed the confirmation thereof. An order of confirmation was made, but the owner did not accept the compensation awarded him. It was held that the appearance of the appellant, in opposition to the subsequent proceedings, cannot be regarded as a waiver of the right of appeal. It is only when a party accepts some benefit under an order that he waives his right to appeal from it. In this case, the appellant did not accept the compensation awarded him, nor any other benefit from the proceedings, nor even take part in the assessment of his damages; but he opposed the whole proceeding.

In *Reed v. Lozin*, 31 Hun, 286, an action was brought by a creditor of a deceased debtor against his heirs or devisees, to collect the debt from real estate acquired by them from the deceased. An order of reference was made in the action, upon the defendant's default, and an application was made by him to open the default, and for a rehearing, and was denied. An appeal was taken from this order to the general term by the defendant. Before the appeal was brought on for argument, a motion was made on behalf of the plaintiff to dismiss it. The trial had already taken place before the referee, and he had made his report. The defendant participated in this trial, cross-examining the plaintiff's witnesses and producing witnesses on his own behalf; but the defendant did not intend, in participating in the proceedings, to waive or surrender his objection to the order by which the action had been referred. He had, when the hearing was about to commence, taken the objection before the referee that the reference was unauthorized, and stated that an appeal would be taken from the order, and it was only after this objection was overruled, that he proceeded with the hearing

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of the case. After the evidence was through, the objection was again renewed that the referee was without authority to proceed, and was in like manner overruled. And it was held that, under these circumstances, the defendant did not, by his conduct, consent to or acquiesce in the reference, and thereby waive his right to appeal from the order denying his motion to open the default. The proceeding with the trial of the action before the referee of itself was not a waiver or surrender of the right to appeal from the order. This has been rendered clear by § 1351 of the Code, which has provided that an appeal from an order without security and without a stay does not prevent the other party from taking the proceedings provided for or allowed by the order.

In *Brown v. Mayor*, 9 Hun, 587, an action was commenced on a claim and referred. On the death of the plaintiff, an order was made denying the motion to confirm the referee's report, substituting his executors as plaintiffs in the action, and referring the report back to the referee for the purpose of taking further evidence, etc. In pursuance of this order, further hearings were had, at which the plaintiff appeared and gave testimony. They afterward appealed from the order, and it was held that, as such appearance was compulsory, they were not thereby deprived of their right to appeal from the order. The order was made on motion of the respondent and opposed by the appellants, and it cannot properly be said to be an order made upon the motion of the appellants, and on their behalf, though some portions of it appear in some respects to be favorable to them. As to them, it was an order *in invitum*, and they are parties aggrieved by it, within the sense of that term as used by the Code. Their right to an appeal was not lost by their having appeared before the referee, and given testimony in the proceeding, as that appearance was made compulsory by the terms of the order.

By pleading.—In *Prescott v. Tousey*, 49 Super. 53, the defendant pleaded as a defense in an action that the damages sought to be recovered were embraced in a judgment in a former action, and that said judgment still remain in full force and effect. Subsequently, and before the time to amend, as of course, expired, he served an amended answer omitting such defense. And it was held that his course was not inconsistent with, or a waiver of, a right to appeal from such former judgment.

An appeal may be waived where the appellant avails himself of some favor that is granted by the order of judgment appealed from, or where he takes some step that is inconsistent with a denial on his part of the correctness of the order. 11 Daly, 297. An appellant may, however, in some cases, take the benefit of an order or judgment without losing the right to appeal from it; thus he may accept money or property awarded

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to him by a judgment, and still prosecute an appeal from the judgment if it denies to him the full measure of relief to which he conceives himself entitled. *Id.* Higblev. Westlake, *ante*. If he seeks to set aside or reverse the judgment *in toto*, his enforcing the judgment would be a waiver of the appeal; but if he prosecutes the appeal merely for the purpose of modifying the judgment so as to increase the amount of his recovery, it is not a waiver. *McNamara v. The Canada Steamship Co., ante*; *Knapp v. Brown ante*. So also, if the amount of the judgment is paid to him voluntarily, without his making any attempt to enforce such payment, his acceptance of the money will not be regarded as a waiver of the right to demand an absolute reversal of the judgment. *Id.* Bankard v. Babcock, 2 Robt. 175. It is also well settled that proceeding under an order, not to enforce it, but to resist an unfavorable result under it, is not a waiver of an appeal from it. *McNamara v. The Canada Steamship Co., ante*; *Barker v. White, ante*.

In the case first above cited, a motion was made by defendant to set aside the summons upon the ground of an improper service, and said motion was denied. Subsequently the defendant interposed an answer in which the objection to the service of the summons was reiterated in the form of a plea to the jurisdiction. He then appealed from the order denying his motion to set aside the summons, and the plaintiff moved to dismiss the appeal upon the ground that the defendant, by such answer, had waived his right to appeal. And the court held that the appeal was not waived by the interposition of the answer. After a refusal to set aside the summons, two courses were open to defendant in this case; one to let judgment go by default for want of an answer, and the other to put in an answer. If an answer was interposed, defendant had the right to plead a want of jurisdiction in the court, and such a plea, if established, is a complete defense. *Wheelock v. Lee*, 74 N. Y. 495. To repeat an objection is certainly not to waive it.

In *Farmers' Loan and Trust Co. v. The Bankers and Merchants' Tel. Co.*, 109 N. Y. 342, the plaintiff, upon motion on notice at special term, obtained leave to file and serve a supplemental complaint with ten dollars costs of the motion to the defendant. The defendant received the costs, and subsequently appealed to the general term from the rest of the order. The plaintiff gave notice of a motion to dismiss the appeal upon the ground that the right to appeal had been waived by accepting the costs so ordered to be paid. The motion was denied, the general term reversed the order of the special term, and the plaintiff appealed to the court of appeals from the order denying the motion to dismiss and also from the order of reversal. And it was held that the acceptance of the costs was not a waiver of the right to appeal from the rest of the order. The imposition of costs was not conditional but abso-

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lute. If the plaintiff had refused to avail itself of the permission to plead anew, it would still have been liable to the defendant for the costs of the motion, as they were neither connected with, nor dependent upon, that portion of the order from which the appeal was taken, and a review could be had of this part without affecting the remainder.

By stipulation.—In *Stedeker v. Bernard*, 93 N. Y. 589, a judgment was granted on motion to set aside defendant's answer as improperly verified, sham and frivolous, and defendant moved to open the default and for leave to serve an amended answer, which was granted, but the order was reversed, on appeal, by the general term. On an appeal to the court of appeals from the order of the general term, the defendant gave an undertaking to the effect that, if said order was affirmed or appeal dismissed, he would pay any judgment entered upon the original order. The order appealed from was affirmed and judgment entered. And it was held that the defendant was not estopped by the undertaking from appealing from the judgment; that the clause referred to was satisfied by holding it to relate to the final judgment in the action; and that a stipulation barring the right of appeal given by law should be very clear in its terms and should leave no doubt of the intention of the party to cut himself off from the right of appeal, before it should be so construed.

In *The Ogdensburg and Lake Champlain R. R. Co. v. The Vermont and Canada R. R. Co.*, 63 N. Y. 176, an action was brought to determine the validity of a lease of its railroad executed by the plaintiff to defendants other than Schrier, who was in charge of the road as superintendent. The other defendants were non-residents and foreign corporations. The complaint, after setting forth the lease, stated that, if an agreement annexed thereto should, by competent judicial authority, be adjudged to be legal and valid, the pecuniary results thereof would not be objectionable to the plaintiff, and that it would be content therewith. The superintendent demurred to the complaint that it did not state facts sufficient to constitute a cause of action; and the other defendants demurred on the ground that the court had no jurisdiction. The demurrers were sustained. The plaintiff appealed to the general term and the judgment was affirmed and from that judgment he appealed to the court of appeals. A motion was made by the defendants to dismiss the appeal. It was held that a simple statement that the plaintiff would be content with an adjudication that the lease was legal and valid, did not deprive the plaintiff of the right to appeal. A party may, doubtless, waive the right to appeal, or be deprived of it by stipulation. But this right is a valuable one, and the agreement to surrender it must be based upon some consideration, or the facts must estop the party from exercising it. In this case, the plaintiff has received no consideration for the surrender of its right of appeal, and there are no facts which

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enable the defendants to evoke the doctrine of estoppel against it; and there was no intention to waive or stipulate away the right of appeal.

And it was further held that the plaintiff, though he continued, after judgment and appeal, to receive the rents reserved by the lease, was not thereby estopped from prosecuting its appeal; as, whether the lease should ultimately be held valid or not, it was entitled to compensation in some form for the use of its road, and by taking what the parties had stipulated to be the value of such use, it did not deprive itself of its right to appeal.

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In the Matter of the Judicial Settlement of the Accounts
of ASA BIGELOW KELLOGG, as Executor, etc.

Court of Appeals, January 18, 1887.

Affirming same matter, 39 Hun, 275.

1. *Gift. When fraudulent.*—A gift by a testator some five years before his death when his assets far exceeded in value the amount of his debts, in the absence of an actual intent to defraud, is not a fraud upon his creditors, though he died insolvent.
2. *Appeal. What reviewed.*—An appeal to the court of appeals from an affirmance, by the general term, of a surrogate's decree brings up nothing for review on behalf of a party, who has not appealed to the general term, or who has not excepted to any of the findings or decisions of the surrogate.
3. *Payment.*—Where an attorney, who had made a collection for the testator and was directed to pay the amount to his agent, who afterwards became his executor, deposited the proceeds in the bank in his own name, and sent his check to such agent payable to him, which was received prior to, but on the same day that testator died, and the money drawn thereon two days later and credited in his account with the testator, the delivery of the check at the agent's office to some one in charge there, was a delivery to him and operated as a payment *sub modo*; and, when the money was drawn upon the check, the payment related back to the delivery of the check; and he did not draw the money as executor but as payee of the check, and could not, in law or equity, be compelled to account for the check except by first applying it upon what the testator owed him in current account.
4. *Appeal. Objection first raised.*—An objection to a claim paid by an executor that it was barred by the statute of limitations at the time of payment, if not taken upon the proceeding for the judicial settlement of the executor's account, cannot be raised on appeal.
5. *Executor. Admissions of claim.*—An executor, in admitting a claim against the estate, acts for and represents all the persons interested in the estate, and his admission alone, in the absence of countervailing evidence, fraud or collusion, is sufficient to authorize the surrogate to find that the claim had not been paid and has been kept in life by payments made thereon.
6. *Limitations. Indorsements.*—Indorsements made while a note is in

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life, and when against the interest of the holder to make them unless true, are *prima facie* evidence of payments, even though made after the lapse of six years from the date and maturity of the note.

7. *Evidence. Section 829.*—The testimony of an executor, on his judicial settlement, as to a payment made by him to the testator, in order to obtain a credit for the amount, relates to a personal transaction with the testator, and is properly excluded under the provisions of section 829 of the Code.
8. *Appeal. Modification.*—The general term has the right and power, under section 2587 of the Code, to modify a surrogate's decree on a judicial settlement by striking out an erroneous charge and readjusting the account, instead of sending it back for a rehearing before the surrogate.

Appeal from a judgment of the general term of the supreme court, modifying, and affirming as modified, a surrogate's decree on a judicial settlement of the accounts of an executor.

Arthur H. Smith, or Sarah A. Kellogg, a legatee, appellant.

L. Laflin Kellogg, for Asa B. Kellogg, executor, appellant.

Matthew Hale, with *Ward & Cameron*, for Aletha A. Akin, a creditor, respondent and appellant.

EARL, J.—These appeals bring to our attention several matters, which will be separately considered.

1. Prior to 1876 the testator held a note for upwards of \$11,000 against the executor, and early in that year he gave it to the executor, who destroyed it. The testator lived until October 10, 1881, when he died insolvent. It was claimed by the testator's widow, who at the accounting was the sole creditor, that, at the time he made the gift of the note, the testator was insolvent, and hence that the gift was fraudulent and void as to her, and that, therefore, the executor, as to her, should be charged with the amount of the note. In the surrogate's court he was so charged; but the general term reversed the decision of the surrogate as

to that item, and relieved the executor from the charge, and, we think, correctly. We do not determine that the surrogate had jurisdiction to enter upon the inquiry whether the gift was fraudulent and void as to creditors, and that, finding it fraudulent and void, he could, on that ground, charge the executor with it, although it was good and valid as against the testator. But passing the question of jurisdiction, we fail to find any evidence in the record that, at the time of the gift, more than five years before his death, the testator was insolvent. After that time, he had left a valuable farm and other assets, in all, far exceeding in amount the value of his debts, and hence the gift, in the absence of an actual intent to defraud, (of which there is no proof or finding,) was not a fraud upon the creditors, and must stand.

2. During the life-time of the testator, for some years prior to his death, the executor was the general agent of the testator, having the general management of his business, and as such he placed in the hands of an attorney, a claim against one Schuyler for collection. Suit was brought upon it, and the attorney, some time before the death of the testator, collected \$6,500. From that sum he deducted \$500, for his services, and afterwards, on the tenth day of October, while the testator was still alive, he drew his own check upon a New York bank for the sum of \$6,000, payable to the order of Asa B. Kellogg, the executor, and sent it to his office in the city of New York, and it was there delivered to some person who was in charge of the office, before the testator's death, with directions to telegraph its delivery to the executor, who was then with the testator at Greenbush. The testator died the same day and, on the twelfth day of October, the executor drew the money on the check, and credited it in his account with the testator. After such credit, there was still a balance due from him to the testator, with which he charged himself on the accounting. The surrogate allowed the \$6,000, as a

credit in the account of the executor, as claimed by him. But some of the appellants claimed that that sum should have been charged to the executor as if he had actually received the check after the testator's death, and that the courts below erred in not so charging it. We are of opinion that none of the appellants are in a position to claim any error here as to this item. Mrs. Akin, the widow, neither excepted to the finding of the referee, nor appealed to the general term. The general guardian of the infant appellants appealed, but did not except to any of the findings or decisions of the surrogate, and the special guardian of the infants filed exceptions, but did not appeal to the general term. An appeal to this court from an affirmance by the general term of a surrogate's decree brings nothing here for review, where there was no appeal to the general term, and upon an appeal from a surrogate's decree, no complaint can be made of any finding or decision which has not been excepted to. Code, § 2545. But for a further reason we think there was no error in reference to this item. The money, when collected, was deposited by the attorney in his bank account, and hence he became a debtor to the testator for that sum. He had been directed by the testator to pay it, when collected, to the executor, as his agent. He made such payment by his check, and when the check was delivered at the office of the executor for him to some one there in charge, it was delivered to him, and operated as a payment *sub modo*. He could then treat it as funds in his hands, to be applied, so far as needed, in payment of what the testator then owed him. When the money was drawn upon the check, the payment related back to the delivery of the check. He did not draw the money as executor, but as payee of the check, and he could not, therefore, in law or equity, be compelled to account for the check except by first applying it upon what the testator owed him in current account.

3. At the time of the death of the testator, his widow

held a note for \$5,000 against him, given for borrowed money, dated March 17, 1870, upon which there were indorsed the following payments: \$350, March 17, 1873; \$350, March 17, 1874; \$350, March 17, 1875; \$300, March 17, 1877; and \$200, December 8, 1880. It was proved that the indorsements were made by Mrs. Akin at their dates. The note had been presented to the executor as a claim before the accounting, and admitted by him, and he had made payments upon it. The objection is now made by some of the appellants that the note was barred by the statute of limitations, and that the surrogate erred in ordering the executor to pay it. To this there are several answers. The only objection filed to this note before the surrogate was that it had been paid; and the statute of limitations does not appear to have been mentioned during the trial. The objection that the note was barred should not, therefore, prevail here. The executor had admitted the claim upon the note, and, in doing that, he acted for and represented all the persons interested in the estate. The admission implied that the note had not been paid, and that, by payments made thereon, it had been kept in life: and so, upon the admission alone, in the absence of countervailing evidence, fraud or collusion, the surrogate was authorized to find. But proof that the indorsements were made at their dates was sufficient to authorize the surrogate to find, and required him, in the absence of conflicting evidence, to find, that the note had been kept in life by payments actually made. The indorsements were all made while the note was in life, and when it was against the interest of the holder to make them unless true. It matters not that the last two payments were made after the lapse of six years from the date and maturity of the note. It is the fact and that alone, that it was against the interest of the holder to make such indorsements, that makes them *prima facie* evidence of payments. *Roseboom v. Billington*, 17 Johns. 182; *Risley*

v. Wightman, 13 Hun, 163; *Hulbert v. Nichol*, 20 Hun, 454.

4. It is claimed, on behalf of the executor, that his evidence as to the payment of \$590 to the testator was improperly excluded, and that he was thus erroneously deprived of a credit for that sum. The payment was a personal transaction with the testator, and hence, under section 829 of the Code, he was incompetent to prove it. We cannot be certain, from an examination of all the evidence that the testator, by his previous examination on behalf of the contestants, had been rendered competent to testify as to the payment, and, in view of the small difference the allowance of this credit would make in the final result, we are constrained to hold that the surrogate did not err in reference thereto.

5. The executor claims that the general term erred in its modification of the surrogate's decree, and that it should have sent the case back to the surrogate for a rehearing. By the finding of the surrogate that the executor was chargeable with his note for upwards of \$11,000, the estate of the testator was shown to be solvent, and there was enough to pay all the debts in full. But when the general term, upon the claim of the executor, struck out the note as the charge against him, the estate was shown to be insolvent, and then it appeared that the executor had made an overpayment to one of the creditors, whom he had paid in full. In readjusting the account, the general term disallowed this overpayment, and in this no error was committed. Objection to the overpayment was distinctly made before the surrogate. The general term had power to reverse, affirm, or modify the decree appealed from. Code, §2587. All the elements for the modification appeared in the findings of the surrogate, and it had the power to render such a judgment as the surrogate should have entered. The only error found by the general term was the charge against the executor of his note for upwards of \$11,000, and interest, and the only

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modification of the surrogate's decree was that made necessary by the disallowance of that charge, and that modification the general term was competent to make.

This case is not without some difficulties; but, after careful consideration, we have reached the conclusion that the judgment should be affirmed, without costs to any party.

All concur.

KATE E. SHERRY, as Administratrix, etc., Appellant, v. THE
NEW YORK CENTRAL AND HUDSON RIVER RAILROAD
COMPANY, Respondent.

Court of Appeals, January 18, 1887.

Reversing same case, 40 Hun, 634, Mem.

1. *Negligence. Contributory.*—Though the bell is not rung or the whistle sounded, it is still the duty of a traveler on the street crossed by the railroad to exercise due care and diligence to discover whether a train is about to pass, and if he fails to do so, or if, seeing the approaching train, he nevertheless undertakes to cross, he is guilty of negligence, and, in either case, if injured, so contributes to the accident that he can have no just cause of action. To determine whether a complaining party is within this rule of exclusion, or whether his conduct in a given case is consistent with reasonable and ordinary care, is in view of all the circumstances surrounding the transaction, usually a question for the jury; and only in exceptional cases, when no facts are in dispute, nor any weighing of testimony necessary, can the court answer it.
2. *Same. Nonsuit.*—Where it cannot be said, as matter of law, what a prudent and reasonable person would have done in circumstances similar to those in which the intestate was placed, a jury alone can determine what was his duty, and how far it was performed, and the court would err in granting a nonsuit.

Action to recover damages for alleged negligence, causing the death of plaintiff's intestate, who was killed while crossing the tracks of defendant's road. Plaintiff was nonsuited

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on the trial on the ground of contributory negligence on the part of the deceased.

Appeal from a judgment of the general term of the supreme court, affirming a judgment of the circuit granting a nonsuit.

Crumby & Jones, for appellant.

C. D. Prescott, for respondent.

DANFORTH, J.—The learned counsel for the respondent, at the opening of this argument, conceded that he was bound to assume, for all the purposes of the case, that upon the occasion in question the defendant omitted to give the statutory signal of its approach. It was therefore in fact and in law guilty of negligence. But although the bell was not rung or the whistle sounded, it was still the duty of one traveling on the street crossed by the railroad to exercise due care and diligence to discover whether a train was about to pass, and if she failed to do so, or if, seeing the approaching train, she nevertheless undertook to cross, she was guilty of negligence, and, in either case, if injured, so contributed to the accident that she can have no just cause of action. To determine, however, whether a complaining party is within this rule of exclusion, or whether her conduct in a given case was consistent with reasonable and ordinary care, all the circumstances surrounding the transaction are to be examined. Usually, therefore, the question is for the jury, and only in exceptional cases can the court answer it. The court may dispose of the case; and it is its duty to do so when no facts are in dispute, or any weighing of testimony necessary.

The case before us was disposed of by the trial judge as one of that character, and the appeal questions the correctness of his decision. The appellant here was plaintiff in the action. Her intestate, Charlotte Briggs, was struck and killed by the defendant's locomotive engine at the railroad crossing

of Fifth street, in the village of Little Falls, between 2 and 3 o'clock in the afternoon of October 4, 1883. The railroad of six tracks crosses the street upon a curve, but nearly at right angles. It afforded protection by neither flagman nor gate, and, upon the occasion in question, its train came from the west upon the crossing, out of time, at the speed of 30 miles an hour, sounding neither bell nor whistle, and, so far as appears without other warning of its approach. Between Fifth street and the west were various obstructions to the view, a ledge of rocks separating two of the tracks from the other four, and the fences of a cattle-yard extending up to the west line of Fifth street. On this occasion there were also box cars of the defendant upon a side track, just west of the crossing, and which cut off the view until the wayfarer had actually reached the main track. The curve was of such a radius that although, when on the tracks, a person could, according to her position, see an approaching train at a distance of from 580 to 645 feet, she could, under the most favorable circumstances, identify the track over which it moved at but from 400 to 440 feet. There was much wind at the time, and south of the railroad, and in its vicinity, were mills and factories, whose machinery created considerable noise.

The woman came along Fifth street to the crossing, passed over two tracks and through the intervening space by the box cars to the most northerly, or fourth, of the four tracks, and, passing on, had reached No. 1, or the most southerly, when she was struck and killed. In deciding the motion for a nonsuit the court held that, under the circumstances in evidence, it would be a question for the jury whether "she may not have exercised her hearing—may not have listened,—and still not have heard the train; that whether she could have seen the train from the open space, or from the most northerly of the four tracks, was also for the jury saying "upon the evidence here, the jury would have a right to find that there were box cars there, and that her view

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was impeded somewhat by those, so they might find she could not see upon the track until she passed to the south-erly edge of that siding, or stepped over the rail." Nor did the learned judge think that it could be said as matter of law that she did not look while on the railroad after passing the point up to which she could not see. From that point where the view was unobstructed by the box cars across the road to the rail of track No. 1,—where she was killed,—was thirty-two feet and two inches. It was covered by the defendant's tracks. She was upon them, and the argument is that, if she looked, she must have seen the approaching train, and during that time had the ability to save herself by keeping off the track No. 1. "I am hardly willing," says the learned judge, "to say that, whether she looked or not, might not be a question to the jury. What I do think is that she had no right to pass over that thirty-two feet and two inches, and go upon that track, with the train in full view coming towards her; and when she did it, she did it either from a thought that she could get over in safety before the train struck her, or made a miscalculation; and, if she did, that is negligence, because, when she saw the train coming, her duty was not to attempt to get past before the train came, but to wait;—and, if she took the chances, she took the chance of her death, without holding the defendant liable."

Upon this ground the nonsuit was granted, and upon this ground the learned counsel for the respondent contends that it should be sustained. Certainly, upon the evidence there is no other. In approaching the railroad, and entering upon its group of tracks, the jury might well find that the traveler exercised as much diligence as a prudent person would exercise under the circumstances, having regard for her own safety and fairly endeavoring to perform her duty. This, under the rulings of the trial judge, was the law of the case. She undoubtedly came into a place of danger the instant her foot touched the road-bed of the defendant; but the omis-

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sion of the defendant to obey the law, and give notice of the running train, was an assurance of safety, and that no locomotive engine was within 80 rods of the place where she then lawfully was. That omission was not only negligence and a violation of a statutory duty on the part of the defendant, but it also bears upon the conduct of the plaintiff, and must effect any estimate of the amount of care she should have observed. Nor did the court hold that she did not look or observe after reaching the tracks. She is charged with having seen the train before she reached the track where she was killed. The evidence permits the inference that, before reaching the middle of the four tracks, the train could not be seen, and might not be heard, and, when first in view, that it would be difficult to determine on which of the four tracks it was moving. One L., passed over the same crossing just a little ahead of Mrs. Briggs. He first saw her as he was going upon the track from the north, she then being 20 feet behind him. He passed completely over the railroad, and reached the south side of all the tracks, when he first heard the train approaching. He heard the noise, but could not see the train. "After hearing the train, and while standing within four feet of the first track," he says, "I saw the old lady between tracks two and three." C., being south of the crossing, saw her coming from the north towards and upon the four tracks. "Before going on she raised her head up." He says: "As the train rounded the curve the old lady was somewhere between tracks two and three, coming south, facing me," and adds: "From the point where the old lady was when the train rounded the curve, the track upon which a train approaching from the west is coming cannot be determined without you are familiar with the tracks. The track the train is approaching on cannot be seen. I next," he says, "saw the old lady between tracks one and two. I then saw her throw up her head and quicken her pace. She was coming to the south. My attention was called to the train as it came

down between Fifth and Sixth streets. It was blowing off steam. I noticed the smoke. It was a cold, windy afternoon. The wind was blowing from the west. From where I stood I could see the steam and smoke. The wind blew it to the ground facing the engine. It blew it down in front of the engine. The old lady at that time was between tracks one and two." At that time, also, a train was coming from the east; and, on the crossing just south of the railroad, the witness L., was preventing, with some difficulty, another woman, drawing a little wagon, from entering upon the railroad.

There is other evidence bearing upon these circumstances and, in reviewing the propriety of a nonsuit, the appellant is entitled to have all of it construed in a manner most favorable to her contention. *Harris v. Perry*, 89 N. Y., 308. We think it cannot properly be said, as matter of law, that the intestate was in fault. By the sudden appearance of the locomotive she was called upon to determine whether she should stand still or go north or south,—north to retreat, or south to get over the tracks. If, as is assumed, she saw the locomotive, it may also be inferred that she was ignorant as to which track it was upon. The configuration of the tracks, the wind driving before the locomotive its steam and smoke, might well tend to disturb her judgment. The noise of the mills; the fracas with the woman whose course was interrupted; the train coming from the east; even the very number of the tracks,—might add to her confusion. Determine she must, and that instantly, between these hazards. It cannot be said, as matter of law, what a prudent and reasonable person would have done in circumstances similar to those in which the intestate was placed. For aught she could see there was possible danger in each direction, and her present position one of jeopardy. A jury alone can determine what was her duty, and how far it was performed. These things were to be ascertained as facts, and the principle embodied in the maxim, "*ad questiones*

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facti non respondent judices," has full application. *Wasmer v. Delaware, etc., R. Co.*, 80 N. Y., 218; *Beisiegel v. Same*, 84 N. Y. 622; *Greany v. Long Island, R. Co.*, 101 N. Y. 419.

We think the court erred in taking the case from the jury. The judgment should therefore be reversed, and a new trial granted, costs to abide the event.

(All concur, except EARL, J., taking no part.)

EDWARD J. KELSEY, Respondent, *v.* JAMES SARGENT,
Appellant.

Court of Appeals, January 25, 1887.

Affirming same case, 41 Hun, 637, Mem.; 3 N. Y. St. Rep. 477.

1. *Judgment. Interlocutory.*—A judgment entered at special term, which makes a reference necessary, is not final, but interlocutory.
2. *Appeal. Order.*—Where an appeal is taken to the general term from an interlocutory judgment, and a motion for a new trial is made at this court as authorized by section 1001 of the Code, and an order is entered affirming the judgment and denying the motion, the portion of the order which denies the new trial is reviewable on appeal to the court of appeals, but no appeal lies from the part of the order which affirms the judgment.
3. *Same. Motion to dismiss.*—Where an appeal in such case is taken from the whole order, a motion to dismiss the whole appeal, and not the erroneous part only, should be denied, and the respondent be required to pay costs.

Motion to dismiss an appeal.

Theodore Bacon, for the motion.

J. & Q. Van Voorhis, opposed.

PER CURIAM.—The judgment rendered at special term made a reference necessary, therefore it was not final, but interlocutory. *Barker v. White*, 58 N. Y. 204.

Opinion, *PER CURIAM*.

An appeal, however, was taken to the general term, and upon exceptions the defendant also moved that court for a new trial under section 1001 of the Code. The judgment was affirmed and the motion for a new trial denied. One order embraced both decisions, and from the whole of that order the defendant appealed.

So far as the appeal affects the order denying a new trial, it was well taken (§ 190, subd. 2; *Raynor v. Raynor*, 94 N. Y. 248, 251), and as the motion to dismiss relates to the whole appeal, and not a part only, it should be denied, and as the plaintiff asks for too much, he should pay costs.

Motion denied, with \$10 costs.

All concur.

ADELE STATES, Appellant, v. CHARLES J. CROMWELL,
Respondent.

Court of Appeals, January 25, 1887.

Appeal Return.—The court of appeals has no jurisdiction to compel an appellant to attach to the return copies of documents whether they are or are not part of the record of the general term; but if they are, for any reason, a part of such record, a motion for that purpose should be made in the court below.

Motion to compel the appellant to correct the return to the court of appeals by adding thereto copies of certain documents, and to serve copies of the return, as so amended upon the respondent.

George Zabriskie, for the motion.

Samuel L. Gross, opposed.

PER CURIAM.—This is a motion to compel the appellant to correct the return to this court by adding thereto copies

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of certain documents, and to serve copies of the return as so amended upon the respondent. A complete answer to the motion is that the documents are no part of the record in the court below, and that the record certified to this court is a correct copy of that record. If the documents should be a part of that record for any reason, we have no jurisdiction to make them a part thereof; but a motion for that purpose should be made to the court below.

Motion denied, with \$10 costs.

All concur.

MICHAEL J. DERELETH, Respondent, v. HENRY D. DE
GRAFF, *et al.*, Appellants.

Court of Appeals. January 25, 1887.

Appeal. Order of affirmance.—An appeal to the court of appeals cannot be taken from an order of the general term, affirming a judgment; nor is an appeal authorized from so much of the order of affirmance as affirms the order denying a new trial, where, on appeal to the general term from a judgment and from an order denying a new trial, both judgment and order are affirmed. In such case, the judgment should be first entered on such order, and an appeal taken from that judgment.

Motion for reargument.

James R. Marvin, for appellant.

Nelson Smith, for respondent.

PER CURIAM.—At a prior term of this court a motion was made to dismiss the appeal in this case, upon the ground that it was unauthorized; and that motion was granted. This is a motion for a reargument of the prior motion. We have carefully reconsidered the matter, and are of opinion that no error was committed.

Opinion, PER CURIAM.

The action was tried before a jury and a verdict rendered in favor of the plaintiff. After the verdict the defendants made a motion before the trial judge, upon his minutes, for a new trial; and an order was entered denying that motion. Judgment was then entered in favor of the plaintiff.

Thereafter a case containing exceptions was settled and the defendants appealed to the general term from the judgment and also from the order denying a new trial; and the general term affirmed both the judgment and the order. Then, before the entry of any judgment of affirmance, the defendants' attorney served a notice of appeal to this court from the judgment entered at the trial term, and also from the order of the general term affirming the judgment and the order denying the defendants' motion for a new trial.

The case of *Kilmer v. Bradley*, 80 N. Y. 630, is a precise authority for holding that the appeal to this court from the order affirming the judgment was unauthorized. Such an order is simply an authority for the entry of the judgment of affirmance. That judgment should first be entered, and an appeal brought from that.

But it is claimed that the defendants had a right to appeal to the court from the order of the general term, so far as it affirmed the order of the trial judge denying the motion for a new trial.

We think otherwise. The appeal from that portion of the order could bring no question to this court which was not involved in the affirmance of the judgment. Upon such an appeal, if we could entertain it, we could review only questions of law raised upon the trial, and those questions would be involved upon an appeal from the judgment to be entered upon the order of affirmance. Under such circumstances an appeal from the order affirming the order which denied a new trial would be entirely nugatory. If that order should be affirmed, the defendants would still have the right, after entry of judgment of affirmance, to appeal from that and try the experiment upon that appeal of procuring a new

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trial by reversal of the judgment. If the appeal from the order affirming the order which denied the motion for a new trial should be successful the judgment would still stand, affirmed, unappealed from, and thus nothing would be gained by the defendants if successful upon the appeal which they claim the right to make without the further interference of the court.

To uphold such an appeal is trifling with the forms of law. Orderly practice requires that a judgment of affirmance should be entered and that the appeal should be taken from that; hence, this is not such an appeal from an order which grants or refuses a new trial as is contemplated by section 190 of the Code; and,

The motion should be denied, with \$10 costs.

All concur.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, v.
HENRY K. STEVENS, Respondent.

Court of Appeals, February 1, 1887.

Reported below, 38 Hun, 62.

Appeal. Criminal law.—The defendant, on an appeal from a conviction by a jury in a criminal case, is entitled to a review of the facts, and the exercise of the discretionary power of the general term of the supreme court. Where the general term puts its reversal in such case upon a question of law, the court of appeals will not review the order, but will remit the case to the general term to enable it to consider the questions of fact, and exercise its discretion.

Appeal from an order of the general term of the supreme court, reversing a judgment of the court of sessions and granting a new trial on a conviction for grand larceny, upon grounds of error of law and not of fact or as matter of discretion.

Opinion, *PER CURIAM*.

Geo. T. Quinby, District Attorney, for appellant.

John Laughlin, for respondent.

PER CURIAM.— The order of reversal states merely that it was made on questions of law. It does not state that the court has considered the questions of fact or exercised the discretion which the statute confers upon it. We have decided that this court will not review an order of reversal in such a case, unless it shows that the court has exercised its discretionary powers. See *People v. Boas*, 92 N. Y. 560-564; *Same v. Conroy*, 97 N. Y. 62-72; *Harris v. Burdett*, 73 N. Y. 136. Although the court in the present case puts its decision upon a question of law, we cannot say it would not have reached the same result had it exercised its discretion, and entertained a different opinion on the question of law. The prisoner was entitled to a review of the facts, and the exercise of the discretionary power of the court, which he might lose if the case should be disposed of solely on a question of law.

The case should, therefore, be remitted to the general term to consider the questions of fact, and exercise its discretion.

All concur.

JOHN N. GRAVILLE Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Court of Appeals, February 8, 1887.

Affirming same case, 34 Hun, 224.

1. *Appeal. By defendant. Amount in controversy.*—On an appeal by the defendant, the matter in controversy in the court of appeals is the amount of the judgment rendered at general term, and from which the appeal is taken. If this judgment, excluding costs, is not less than \$500, this court has jurisdiction to review it. Neither the limitation of the amount demanded in the complaint, nor the method by which the referee ascertained and then made up the aggregate of damages, is material.

See note at end of case.

2. *Same. By plaintiff.*—Upon an appeal by plaintiff from a judgment in such an action, the sum for which the complaint demands judgment becomes material.

Motion to dismiss an appeal from a judgment of the general term of the supreme court.

M. D. Barnett, for the motion.

C. D. Prescott, opposed.

DANFORTH, J.—The plaintiff sues for injuries to personal property caused by defendant's negligence, and after issue joined, was upon trial before a referee awarded \$400, with \$156 interest, making a total of \$556, and for this sum judgment was ordered in his favor. The record shows that judgment was so entered. "Damages \$556 and \$357.44 costs and disbursements." Upon appeal to the general term it was affirmed, and from the judgment of affirmance, the defendant appealed to this court. The plaintiff moves to dismiss the appeal upon the ground as stated in the notice of motion "that the amount in controversy in this action is

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less than \$500." This contention is put upon the complaint, which alleges damages only to the amount of \$400, and demands judgment accordingly. But neither this limitation, nor the method by which the referee ascertained and then made up the aggregate of damages is material. The matter in controversy in this court upon the defendant's appeal is the amount of the judgment as rendered, and from which the appeal is taken. *Brown v. Sigourney*, 72 N. Y. 122. And if that, excluding costs, is not less than \$500, we have jurisdiction to review it. A different rule restricts the plaintiff. Upon an appeal by him from a judgment in such an action, the sum for which the complaint demands judgment becomes material. Code, § 191, subd. 3. But the provision of the Code which makes it so has no application here.

The motion should be denied, with \$10 costs.

All concur.

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The term is found only in subdivision 3 of said section, which, with the last clause of the section reads as follows :

Subd. 3 §191. An appeal can not be taken from a judgment, or from an order granting or refusing a new trial, except in an action or special proceeding affecting the title to real property, or an interest therein, if the matter in controversy, excluding costs, is less than five hundred dollars; unless the court below, by an order made at the general term which rendered the determination, or at the next general term after judgment is entered thereupon, allows the appeal, on the ground that a question of law is involved, which ought to be reviewed by court of appeals.

If an appeal is taken, by the plaintiff, from a judgment rendered in an action not founded upon a contract, the sum for which the complaint demands judgment, or, if the action is to recover one or more chattels, the value of the chattels, as stated in the complaint, is deemed to be the amount of the matter in controversy, within the last subdivision, unless defendant has interposed a counterclaim; in which case the counterclaim must be included, in determining the amount in controversy.

Construction.—In *Butterfield v. Rudde*, 58 N. Y. 489, a judgment was perfected below in favor of plaintiff, upon the verdict of a jury, for \$269.49 damages, besides costs. The judgment was affirmed on appeal to the

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general term, and from the judgment of affirmance, an appeal was taken by defendant to the court of appeals. A motion was made to dismiss the appeal. The appeal is sought to be sustained upon the ground that chap. 322 of the laws of 1874 does not embrace it; and that the judgment, although less than \$500, exclusive of costs, was simply a judgment of affirmance, and that the statute applies, in terms, only to judgments granting or refusing a new trial. And it was held that this construction resulted from a misreading of the statute; and that the words "granting or refusing a new trial" relate to the word "order" only, and not to "judgment." It is the same as though the words "from any" before judgment were repeated before order.

Demand in complaint.—The amount demanded in the complaint is, by §191 of the Code, made controlling only in actions not founded on contract for the reason that in actions *ex contractu*, the facts alleged in the complaint may show that the plaintiff, if successful, would not be, in law, entitled to recover as large a sum as he demands as damages. The distinction is not made upon the theory that he may, in an action on contract, recover more than he demands in his complaint. *Van Gelder v. Van Gelder*, 81 N. Y. 128.

In *Zoeller v. Riley*, 1 How. N. S. 525, an action was brought for the conversion of property alleged to be worth \$500, for which sum the complaint demanded judgment; but on the trial the only evidence as to value was that the property was worth about \$300. The complaint was dismissed, and plaintiff appealed to the general term of the city court of Brooklyn, and from an affirmance of the judgment there, to the court of appeals. The defendant moved to dismiss the appeal on the ground that the matter in controversy was the value of the chattel, and as that was less than \$500, the judgment was not appealable to the court of appeals. But the appellant claimed that the value of the chattel as alleged in the complaint, and for which judgment was demanded, was the matter in controversy within subd. 3, of §191 of the Code Civ. Pro., and that the testimony on the trial could not be considered in fixing the amount in controversy. And it was held that, as the action was not founded upon contract, the sum for which the complaint demanded judgment was deemed to be the amount of the matter in controversy within the meaning of § 191 of the Code, though the proof given upon the trial showed that the plaintiff's damages were less than \$500.

In *King v. Galvin*, 62 N. Y. 238, an action was brought for the wrongful taking of goods described in a schedule annexed to the complaint, and the amount of damages demanded was \$1.700. The plaintiffs, by their own stipulation, withdrew from the controversy their demand for a portion of the goods mentioned in the complaint, which was conceded to be the principal part of the property originally in controversy; and in case of a new trial, all they could possibly recover for would be the residue, and its value is all that is now in controversy and is less than \$200.

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The judgment was for the defendant; and the sum demanded in the complaint, in the absence of any modification of such demand, would, for the purposes of an appeal, have been deemed the amount in controversy in the action.

But it was held that the amount claimed in the complaint was no longer any guide for ascertaining the amount in controversy; that the parties have, by their own stipulation, deprived it of its efficacy for this purpose, and rendered a reference to it contemplated by the act of May 2, 1874 useless; and that the provision of this act is not applicable where the parties have by stipulation modified or reduced the demand contained in the complaint.

In *Folts v. The State of New York*, Court of Appeals, Second Division January 31, 1890, the plaintiff, in December, 1878, duly presented his claim to the canal appraisers, and not having been heard or determined, it was transferred under chap. 205, 1883 to the board of claims, who awarded \$213.50, but could have awarded a just claim of \$501, and it was held that the court of appeals would direct a rehearing of the claim.

How amount in controversy determined.—In *Campbell v. Mandeville*, 110 N. Y. 628, an action was brought to foreclose a mechanic's lien, and the complaint alleged the balance due of \$588.96. The answer denied any indebtedness and set up a counterclaim of \$100. The defendants offered to allow judgment for \$240.55. The trial court reduced the plaintiff's claim from 588.96 to \$493.39 which, with interest added, amounted to \$511.66. The matter in controversy between the parties was not the right of plaintiff to recover at all, but as to the amount of the recovery. The defendants appealed to the general term, and from a judgment of affirmance there, to the court of appeals. And it was held by the latter court that in determining as to whether the matter in controversy in an action is \$500 or over, within the meaning of §101 of the Code, resort may be had to the proceeding and evidence appearing in the record as well as to the pleadings, and that the judgment was not reviewable in the court of appeals.

In *Roosevelt v. Linkert*, 67 N. Y. 447, an action was commenced to recover a balance of \$997.52, alleged to be due plaintiff for services. The defendant alleged, in his answer, certain counterclaims amounting to \$1,322.32. The action was tried before a referee, who found the value of plaintiff's services to be the sum of \$1,303.34, of which he had been paid the sum of \$320.50, leaving a balance of \$982.84 due; and he found the counterclaims to amount to \$595.50, and the balance due plaintiff, after deducting the counterclaims, \$387.34. For the latter sum, with interest, amounting to \$412.29, he ordered judgment, and judgment was entered, in favor of the plaintiff. The defendant appealed to the general term, and from the judgment of affirmance there, to the court of appeals. A motion to dismiss was made by the plaintiff on the ground that the judgment, exclusive of cost, does not exceed \$500. And it was held that, if either the judgment or the subject matter in controversy does not exceed \$500, there can be no appeal to the court of appeals. If the judgment is for the re-

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covery of an amount of money, to give the right of appeal, it must, in all cases, exceed \$500. When the action is not one affecting the title to real estate or an interest therein, and there is no judgment for money, then the subject matter in controversy must exceed the above amount. To ascertain the amount of the subject matter in controversy, in such cases, the pleadings will not alone be looked to, but the whole case, to see what the real controversy is and the amount of it, except in the single case, viz., "In actions not founded upon contract, when the judgment appealed from is for the defendant, the amount claimed in the complaint shall be deemed the amount of the subject matter of the controversy."

Judgment.—In *McMillan v. Cronin*, 75 N. Y. 474, it was held that, where it appears that the amount of the recovery is less than \$500, no appeal lies to the court of appeals from the judgment of the general term.

In *Petrie v. Adams*, 71 N. Y. 79, an action was brought to foreclose a mortgage executed to the plaintiffs for the sum of \$1,100, and interest. Defendant held a judgment against the mortgagor for the sum of \$132.05, prior in date to the mortgage. Plaintiffs asked for a judgment adjudging that the lien of the judgment was subsequent and subordinate to that of the mortgage. The defendant answered, and the only question in controversy was as to the priority of the liens. The special term decided in favor of the plaintiffs for the full amount of the mortgage; but the general term held that only \$500 of plaintiffs' mortgage was entitled to a preference over the judgment and directed that the judgment below be modified accordingly. Both parties appealed from this judgment to the court of appeals. And it was held that the amount in controversy was the amount due on the judgment, and that, as this was less than \$500, the judgment below was not appealable. If the plaintiffs succeed in their appeal and the judgment is postponed to the entire mortgage, the defendant may not be able to collect his judgment from the mortgaged premises; and if the defendant succeeds in his appeal, and the judgment is given a priority in payment to the mortgage, the plaintiffs may, to the amount of the judgment be deprived of the benefit of the mortgage.

In *The People ex rel. Wright v. Willard*, 110 N. Y., 662, an action in the nature of *quo warranto* was brought by the attorney-general to oust the defendant from the office of trustee of the village of Northville, county of Fulton, in which office it is claimed he had unlawfully intruded, and therefrom had excluded the relator. The relief demanded was for judgment of ouster against the defendant and also for restoration of the relator to the office; no other relief aside from costs was demanded. The action was tried by the court without a jury, and the trial resulted in a judgment, adjudging the relator to be entitled to the office, and that the defendant was not entitled thereto, and giving costs against him. From that judgment, the defendant appealed to the general term, which reversed the judgment and dismissed the complaint, with costs. The plaintiff then appealed to the court of appeals. No order was obtained from the general term allow-

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ing the appeal, and a motion was made to dismiss the appeal upon the ground that the matter in controversy was less than \$500. It appeared that a trustee of Northville is not entitled to any compensation or salary, that there are no perquisites connected with the office, and that no pecuniary consideration is involved in this controversy. And it was held that the case was brought within subd. 3 of § 191 of the Code, and that, as the matter in controversy was less than \$500, the judgment was not appealable. The language of this subdivision is broad and sweeping, and absolutely forbids an appeal to the court of appeals from any judgment, if the matter in controversy, excluding costs, is less than \$500, unless the action is one affecting the title to real property, or some interest therein; and the further provision that the general term may make an order allowing the appeal is intended to provide, besides cases where the pecuniary value in controversy is less than \$500, for those involving important public or private interests which cannot be measured by any pecuniary standard.

If it had been made to appear that the relator had suffered damages amounting to \$500 by his exclusion from office, or that he would be entitled to recover such damages in an action under § 1953 of the Code, the appeal, it seems, would be authorized.

In *Davidson v. Alfaro*, 80 N. Y. 660, an equitable action was brought to compel the set-off of a judgment obtained in favor of the defendants against the plaintiffs, against a claim in favor of the plaintiffs against the defendants. The trial court, as conclusion of law, held that the plaintiffs were entitled to an equitable set-off of their claim, but only against so much of the judgment against them as was for the amount of the verdict, to-wit: \$500. The judgment of the special term was affirmed, and cross-appeals were taken from the judgment of the general term to the court of appeals. And the court held that it had not jurisdiction to hear the plaintiffs' appeal, on the ground that the contest raised in the general term by their appeal was for less than \$500, as they claim that the judgment should have been for more than \$500, but not more than that amount by the sum of \$500. The amount contested in the general term will determine whether the court of appeals has jurisdiction. See *Brown v. Sigourney*, 72 N. Y. 122; *King v. Galvin*, 62 Id. 238.

In *Brown v. Sigourney*, *ante*, the judgment appealed from was entered for \$533.84 damages, and \$107.49 costs and disbursements. An item of \$140.50 entered into the amount of \$533.84 damages, for which the judgment was entered. As to this item, no contest has been made by the defendant, since the jury rendered their verdict. The only controversy since then has been as to the other part of the judgment. This does not, though the judgment does, amount to \$500. And it was held that the judgment was not appealable to the court of appeals and that this court had no jurisdiction to review it. If the amount in controversy, exclusive of costs, is less than \$500, an appeal does not lie, whatever may be the amount at which the judgment is docketed. See *Pennie v. Life Ins. Co.*, 67 N. Y. 278;

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Roosevelt 6. Linkert, *ante*. It is true that the answer in this case raised an issue as to the item of \$140.50, also, and that that item was in controversy at the circuit, up to the submission of the case to the jury. The court speaks of the controversy, in *Pennie v. Life Ins. Co.*, *ante*, as it was at the circuit. But here the court deals with the controversy as it was after the circuit; but the result is the same. The appeal to the court of appeals is from the judgment of the general term, and the amount in controversy there as to which an appeal is sought, is the criterion of the jurisdiction of the former court.

In *Granville v. The N. Y. C. & H. R. R. Co.*, 104 N. Y. 674, an action was brought for injuries caused by the defendant's negligence, and the plaintiff, after issue joined, was, upon a trial before a referee, awarded \$400, with \$156 interest, making a total of \$556, and for this sum judgment was ordered in his favor. Upon appeal to the general term, the judgment was affirmed, and, from the judgment of affirmance, the defendant appealed to the court of appeals. The plaintiff moved to dismiss the appeal upon the ground that the amount in controversy in the action was less than \$500. This contention was put upon the complaint which alleged damages only to the amount of \$400, and demanded judgment accordingly. And it was held that neither this limitation, nor the method by which the referee ascertained and then made up the aggregate of damages, was material. The matter in controversy in this court upon the defendant's appeal, was the amount of the judgment as rendered, and from which the appeal was taken. See *Brown v. Sigourney*, 72 N. Y. 122; and if that, excluding costs, was not less than \$500, this court has jurisdiction to review it. But a different rule restricts the plaintiff. Upon an appeal by him from a judgment in such an action, the sum for which the complaint demands judgment becomes material. Subd. 3, § 191, Code Civ. Pro. But the provision of the Code which makes it so, has no application in this case. *Graville v. N. Y. C. & H. R. R. Co.*, *ante*.

Counterclaim. In *Cass v. Higanbotam*, Court of Appeals, 1885, it was held that a counterclaim exceeding \$500 will give jurisdiction to the court of appeals, on appeal from a judgment of the general term, although the cause of action is less than that amount.

In *Reed v. Trowbridge*, 106 N. Y. 657, the amount in controversy was the sum of \$1,465.47, which the jury allowed to the plaintiff. His right to receive that sum was strenuously disputed and resisted by the defendant. The jury gave the plaintiff a verdict of \$200.47; but this balance was reached, by applying in diminution of the \$1,465.47, an undisputed counterclaim of the defendant, amounting to the sum of \$1,265; but for the allowance by the jury of the \$1,465.47, the defendant would have had judgment for his counterclaim. And it was held that the matter in controversy, under § 191 of the Code, was more than \$500, and that the case was appealable to the court of appeals.

Wiley v. Brigham, 81 N. Y. 13, plaintiff sought to recover the sum of

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\$639.50, as the balance due him upon various matters. The defendant, after denying many of the allegations of the complaint and alleging payments, expressly admitted that he was indebted to the plaintiff in the sum of \$230.89, over and above all payments, off-sets and counterclaims. During the progress of the trial, the defendant asked the referee to be allowed to amend his answer by alleging therein a counterclaim for \$700, which was denied on the ground, in substance, that the facts offered to be pleaded would not constitute a counterclaim. The referee reported in favor of the plaintiff, and the defendant appealed from the judgment entered thereon to the general term, and from the judgment of affirmance there, to the court of appeals.

Under § 191, Code, Civ. Pro., if the counterclaim had been alleged in the answer and put in issue by a reply, the amount in controversy would have been more than \$500, and the judgment would have been appealable to the court of appeals. But in this case the counterclaim was not alleged in the answer, and hence it was not in controversy in the action, whether the referee placed, or did not place, his refusal to allow the amendment upon an erroneous view of the law. The amendment did not become a counterclaim in the action unless it appeared in the answer. Any other view of the law would enable a defendant to bring a case within the jurisdiction of the court of appeals, by a simple offer to amend his answer by alleging a counterclaim, and the effect would be the same, no matter upon what ground the amendment was refused. The actual amount in controversy must be determined by the pleadings as they actually exist.

In *Pennie v. The Cont. Life Ins. Co.*, *ante*, an action was brought upon an endowment policy for \$1,000. The answer admitted the liability and set up a counterclaim for loans amounting to \$204.41. A verdict was directed at the circuit for \$1,083, and the defendant's exceptions ordered to be heard at general term in the first instance. The general term ordered judgment for the plaintiff for \$795.59, from which the plaintiff appealed to the court of appeals, and the question before this court was, whether it was appealable under chap. 322 of the laws of 1874. And the court held that the object of the act was to limit appeals to amounts in controversy exceeding \$500; that, although the judgment exceeded \$500, yet the sum in controversy was considerably less than that amount; and that the only controversy in the case was whether the counterclaim of about \$200 should be allowed. Ordinarily, the amount of the judgment is in controversy; but in this case it was not, for the amount of the judgment was not contested; the only contest was, whether the judgment should be increased about \$200.

Interest.—In *Josuez v. Conner*, 75 N. Y. 176, an appeal by the plaintiff was taken from a judgment of the general term of the N. Y. Common Pleas, affirming a judgment of the trial court, dismissing the plaintiff's complaint, to the court of appeals. The action was commenced February, 19, 1877, the judgment of dismissal was entered October 25, 1877, and the

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appeal to the general term was taken December 3, 1877. The plaintiff demanded judgment for \$414.30, with interest, from January 15, 1875, besides costs. No order of the general term, allowing an appeal to the court of appeals has in this case been made. And it was held that, in determining the question of appealability, the statute furnishes the rule of decision. It declares that the sum for which the complaint demands judgment, shall be deemed to be the amount of the matter in controversy. In this case, this sum is less than \$500, whether reference is made to the time of the commencement of the action the trial, or the first appeal. The time of the commencement of the action, is that which is to govern, and the interest subsequently accruing cannot be taken into account, in determining whether the plaintiff's demand amounts to \$500, though the case is one where allowance of interest to the time of the trial is the ordinary incident of a recovery.

When the action is for the recovery of chattels and the appeal is by the plaintiff, the value of the chattels, as stated in the complaint, is, by § 191, made the test of appealability, though interest by way of damages for the detention is usually allowed, if the plaintiff succeeds in the action.

The court of appeals has held, under the statute of 1874, that, where the right of appeal depended upon the amount of the judgment, interest which accrued after its rendition could not be added to make the requisite amount. See *Produce Bank v. Morton*, 67 N. Y. 199.

The rule that the amount claimed in the complaint, and due according to the plaintiff's claim at the commencement of the action, should govern in determining his right of appeal, is clear and definite, and in harmony with the general principle upon which the statute is founded, that litigations in small causes should terminate with the appeal to the general term.

In *Produce Bank v. Morton*, *ante*, the judgment was entered July 21, 1875, and the sum directed to be paid to the plaintiff for principal and interest amounted to only \$491.20. This judgment is all that the appellant has at stake. A new trial was ordered, and an appeal taken from said order to the court of appeals, the object of which appeal was, by the reversal of that order, to restore the judgment. And it was held that, in such a case, the amount of the judgment, when entered, must govern the question of appealability, and that interest accruing after its rendition cannot be added for the purpose of bringing it up to the requisite amount. The act of 1874 prohibited an appeal from an order granting a new trial, where the amount of the judgment or subject matter in controversy does not exceed \$500. In appeals from orders granting or refusing a new trial, where judgment has been rendered for a specific amount, that must be the test. Where there is no judgment, or it is not for a specific sum, the value of the subject matter in controversy must be ascertained.

In *Van Gelder v. Van Gelder*, *ante*, the complaint demanded judgment for the sum of \$400 for money had and received, with interest from May

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4, 1875. The action was commenced on May 5, 1875. Judgment was rendered for the defendant at special term July 21, 1877, and affirmed at general term September 30, 1878. Under the pleadings, plaintiff could recover only \$400 with interest from May 4, 1875, amounting together at the commencement of the action and even down to September 30, 1878, to less than \$500; but he claims the facts proved show him entitled to interest from 1869. No amendment was made or applied for. And it was held that, if the matter in controversy did not, at the time of the rendition of the judgment, amount to \$500 or more, an appeal from that judgment could not be taken to the court of appeals without special leave. Interest accruing after judgment cannot be added to make the cases appealable to this court. *Produce Bank v. Morton, ante*. And in *Josuez v. Conner, ante*, it was held that the amount due at the commencement of the action according to the claim in the complaint is to govern.

In *Ryan v. Waule*, 63 N. Y. 57, an action was brought for slander, and a verdict for \$500 was rendered for plaintiff on trial on April 7, 1874. Judgment for this amount, together with costs and disbursements, was perfected April, 11, 1874. The judgment was affirmed on appeal to the general term, and perfected July 31, 1875, from which defendant appealed to the court of appeals. No order, as prescribed by chap. 322, Laws of 1874, was granted by the general term. And it was held that the amount of the judgment, without reference to the interest which attaches to it immediately upon its recovery, is made the test of its appealability to this court by chap. 322 of the act of 1874. The interest which accrues as incidental to the recovery constitutes no part of the judgment. Whatever damages the law may give for withholding the debt or not paying the judgment, the amount of the judgment is the same, and that is the amount in controversy under the statute.

And it was further held in this case that the fact that the judgment was rendered before the passage of the act of 1874 does not take the case out of its operation. The right of appeal is one of the remedies at all times within the control and discretion of the legislature.

Real Estate.—In *Norris v. Nesbit*, Court of Appeals, October 21, 1890, a mechanic's lien for \$419.20 was foreclosed, and it was held that the amount in controversy fell below the sum specified by §191 of the Code as condition of the right to have a further review by the court of appeals, and that the judgment was not, therefore, appealable to this court.

Nor does the action affect the title to real property, or an interest therein, within the sense in which that language is to be taken, and in which it has been construed in the court of appeals. See *Wheeler v. Scofield*, 67 N. Y. 311; *Nichols v. Voorhis*, 74 Id. 28; *Trevett v. Barnes*, 110 Id. 509. No action can be deemed to affect the title to real estate merely because it relates to real estate. Whether it is brought for an injury to real property, or to enforce the collection of a claim thereout, it is not included in the

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category of actions which have for their object the determination of title. The judgment in an action to foreclose a mechanic's lien cannot change the title to real estate, or be conclusive evidence against the true owner. Its effect is simply to collect the plaintiff's money demand out of real estate.

In *Nichols v. Voorhis*, *ante*, an action was brought to vacate and set aside an assessment of \$435. 94 upon certain lands of plaintiff for a highway improvement as a cloud on title, and to restrain the enforcement thereof. The defendants separately demurred to the complaint, and the demurrer was sustained. From the judgment entered upon the order sustaining the demurrer, the plaintiff appealed to the general term, where the judgment was reversed. From this judgment of reversal, the defendants appealed to the court of appeals. A motion was made to dismiss the appeal. And it was held that this case was not appealable to this court, for the reason that the amount in controversy is less than \$500.

Unless the action is one affecting the title to real property, or an interest therein, the appeal is unauthorized, where the amount complained of is less than \$500. It is not sufficient that the action relates to real property or in some way affects it; it must itself affect the title or an interest therein. An action to recover the possession of real property, or to set aside or compel a conveyance thereof, or for the partition thereof, is of the latter description. An action for an injury thereto or to foreclose a lien thereon, is of the former description. See *Wheeler v. Scofield*, *ante*. The action in *Nichols v. Voorhis*, *ante*, was not an action to impose an assessment, but to have one declared void. The sole object was to procure an adjudication that an assessment, which is an apparent lien upon real property, is not a lien. The action did not affect, destroy, determine or change any title.

The final judgment in such an action declares the assessment to be void, but in no way affects the title to real property or an interest therein. If it declares the assessment to be valid, the same is true, because the validity of the assessment is then due, not to the judgment, but to the proceedings in which it was imposed.

In *Rogers v. The Village of Sandy Hill*, 94 N. Y. 638, an action was brought to vacate an assessment and to restrain its collection. The amount of the assessment was \$218.70. On appeal to the court of appeals, it was held that the action did not affect the title to real property, or an interest therein; and that the court, therefore, had no jurisdiction to hear this appeal under §§ 190 and 191 of the Code. See also *Nichols v. Voorhis*, *ante*; *Wheeler v. Scofield*, *ante*; *Petrie v. Adams*, *ante*; *Scully v. Sanders*, 77 Id. 598.

In *Trebett v. Barnes*, *ante*, an action was brought to recover damages by reason of injuries inflicted by defendant upon a certain dam, which the plaintiffs alleged, in one count of their complaint, that they were owners of in fee, and alleged in another, that they had the right to use the waters

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in a certain creek, and that the defendant negligently and unnecessarily flooded the stream and washed out and destroyed the plaintiff's dam, etc. The defendants took issue in their answer upon the question of ownership of the dam and the right to use the waters of the creek, and denied any negligence, etc., but set up no title in themselves. The verdict was for \$400 damages, and judgment was entered for that sum, with costs, and, upon affirmance by the general term, the defendants appealed to the court of appeals. And it was held that the appeal must be dismissed for lack of jurisdiction in this court to hear the same. By subd. 3 of § 191 of the Code, an appeal involving less than \$500, exclusive of costs, cannot be taken to the court of appeals, except in an action or special proceeding affecting the title to real property, or an interest therein, unless upon conditions not complied with in this case. It is not enough that the action relates to real property or in some way affects it, it must itself affect the title or some interest therein; *Nichols v. Voorhis*, *ante*; *Scully v. Sanders*, *ante*; but this judgment does neither. That the judgment may conclude the defendants upon the question of the title being in the plaintiffs, is no answer to the court's lack of jurisdiction, for within the meaning of the Code upon this subject, it cannot be said to affect the title of the real estate in such an action as the present, where the defendants make no claim to any title, but simply assert that it exists in a third party with whom they are not in privity; in such case, the title remains wholly unaffected by the judgment.

In *Scully v. Sanders*, *ante*, an action of trespass was brought against defendant for wrongfully entering in and upon plaintiff's lots, and then and there damaging and destroying certain lumber, and disturbing plaintiff in the possession of the lots. The answer admitted the entry, and alleged that defendant took possession and inclosed the lots with a fence, and that he has since been in possession; but denied that he entered or held possession wrongfully, and denied all the allegations of the complaint not admitted. Neither party, upon the trial, proved title to the lots; but both gave some evidence as to possession. The jury rendered a verdict for plaintiff for \$100. And it was held that the judgment did not affect the title to real estate, and was not reviewable, on this ground, in the court of appeals.

In *Knapp v. Deyo*, 108 N. Y. 518, the complaint set out a cause of action, arising from services, performed by plaintiff for defendant during a period of about six years, aggregating the sum of \$2,705.95, admitted payments thereon to the amount of \$2,047, and demanded judgment for the balance of \$658.95. The answer admitted an indebtedness to the amount of \$420, by denying that it exceeded that amount, thus leaving the matter in controversy \$238.95. And it was held that the case did not come within the exception to the rule, as the title to real property was not affected, and no appeal to the court of appeals had been authorized by the order of the general term; and that therefore, the question was to be determined solely

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by the amount in controversy. This is held to mean the amount in controversy before the tribunal from which the appeal is taken to the court of appeals. To determine this amount, resort may be had, not only to the pleadings, but also to the proceedings and evidence appearing in the record of the trial. See *King v. Galvin*, *ante*; *Roosevelt v. Linkert*, *ante*; *Brown v. Sigourney*, *ante*. Where the amount is less than \$500 as appears, not only from the pleadings, but also from the evidence and offer of judgment, the judgment is not appealable, to the court of appeals.

In *Warren v. Wilder*, 114 N. Y. 209, an action was brought to set aside a deed and to compel a conveyance, and it was held that the action was one affecting the title to real property, within the meaning of subd. 3, § 191, Code Civ. Pro., limiting appeals to the court of appeals, and, therefore, the order of the general term granting a new trial, was reviewable in this court, although the judgment represented by plaintiff was less than \$500.

In *Getman v. Ingersoll*, 117 N. Y. 75, an action was brought by plaintiff against defendant, and the relief demanded in the complaint was that a judgment for about \$150, which had been recovered by defendant against the plaintiff, be satisfied, and that the defendant be for ever restrained from selling any of the plaintiff's property by virtue thereof. Subsequently, by virtue of an execution issued upon the judgment, and while this action was pending, the sheriff sold real estate of the plaintiff worth about \$1,000, and, in pursuance of that sale, a deed was afterward given to the purchaser; and the latter was made a party defendant and served with a supplemental complaint, in which judgment was demanded that the sale be set aside, etc. The defendants answered, and the cause was referred to a referee who found that defendant's judgment was valid, the sale regular, the purchaser's title good, and dismissed the complaint. Plaintiff appealed to the general term where the judgment was affirmed, and then appealed to the court of appeals. A motion was made to dismiss the appeal upon the ground that it was unauthorized by the Code, and that this court had no jurisdiction to entertain the same. And it was held that when the action was originally commenced, as defendant's judgment was simply a lien upon the land, it did not affect the title to real property or any interest therein; and, as the matter in controversy was less than \$500, an appeal could not have been taken to this court from any judgment entered in the action; but that, before the original action came to trial, the plaintiff was divested, by the sale, of the title to land worth \$1,000 and that the title to that land came in controversy; and that, under such circumstances, it cannot be said that the action does not affect the title to real property, or an interest therein, within the meaning of § 191 of the Code.

In *Wheeler v. Scofield*, *ante*, it was held that an action to foreclose a mechanic's lien is not an action affecting the title to real estate or an interest therein, within the meaning of the amendment of 1874 to § 11 of the

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former Code, and that a judgment in such an action for less than \$500 is not appealable to the court of appeals. An action to foreclose a mortgage is not, within the meaning of that act, an action affecting the title to real estate, or an interest therein, and the same must be true of an action to foreclose a lien under the lien laws. Such an action is simply to enforce the collection of a money demand out of real estate, and no more affects the title than the attempt to enforce the collection of any debt againsts the debtor's estate. The real estate may be taken, but the action itself does not affect, determine or change any title.

In *Powers v. The City of Yonkers*, 114 N. Y. 145, the defendant entered into a contract with the city of Yonkers for improving one of its streets. Some of the work done by the contractor, which was imperfect, was taken down and rebuilt, but no notice had been given by the city to the contractor to take down and rebuild or otherwise change any of the work which he had done. In an action to foreclose a mechanic's lien upon the moneys unpaid, the city claimed to set-off the amount expended in completing the contract. Some of the lienors who were made defendants, and the amount of whose respective liens was less than \$500, claimed that as against them no appeal to the court of appeals could be taken from the judgment. And it was held that the matter in controversy is the amount due the contractor from the city, as that must be established before any lien upon it can be enforced. By the judgment appealed from, it is first adjudged that the sum of \$2,454.92 is due from the city to the contractor, under the contract, and then \$1,803.01 thereof are distributed among seven persons holding liens, which range in amount from \$40.37 to \$1,190.40, while the remainder is awarded to the contractor; and as the amount due the contractor from the city exceeds \$500 the judgment is appealable.

Statement of the Case.

BESSIE J. CUMMING, by Guardian, etc., Respondent v. THE
BROOKLYN CITY RAILROAD COMPANY, Appellant.

Court of Appeals, February 8, 1887.

Affirming same case, 38 Hun, 362.

Negligence. Street crossing.—In an action for an injury caused by the alleged negligence of a railway company, which ran trains drawn by a dummy engine through the streets of a city, the stopping of its cars so as to wholly obstruct the street and prevent the plaintiff thereby from seeing a train coming behind such cars, until the same was actually upon her, was a fact proper to be submitted to the jury upon the question whether the defendant was guilty of negligence in the running or management of its trains.

2. *Same. Mother of child.*—Where, in an action to recover damages for injuries sustained by a child of tender years, who was struck by a train when passing along a public street where it was crossed by a railroad track, she was not guilty of any negligence, but acted in all she did with ordinary care, it was entirely immaterial that her mother was guilty of negligence in permitting her to be at large; and the admission of incompetent evidence to excuse such negligence on the mother's part was not ground for reversal.
3. *Evidence.*—It seems that evidence that the mother was unable to hire any servant or person to aid her in looking after the child, is not competent to rebut proof of negligence on her part, even were such claim of imputed negligence material.
4. *Charge. Duty of counsel.*—Where the fair import of a charge, taken as a whole, is in accordance with the law, but there is a doubt as to the meaning thereof, and a possibility of the language being construed too broadly by the jury, it is the duty of the complaining party to call the attention of the court to the real error, and not simply take a general exception.

Action to recover damages for personal injuries sustained by plaintiff, alleged to have been caused by defendant's negligence.

Appeal from a judgment of the general term of the supreme court, affirming a judgment in favor of the plaintiff.

Opinion of the Court, by PECKHAM, J.

Morris & Pearsall, for appellant.

B. F. Tracy and Carpenter & Roderick, for respondent.

PECKHAM, J.—The defendant operates a railroad from the City of Brooklyn to Fort Hamilton and runs its cars by means of a dummy engine. Its tracks are laid through Third Avenue, which runs about north and south where it crosses Thirty-ninth Street at right angles.

There was enough proved to make it proper to submit to the jury the question of the negligence of the defendant. The injury occurred on the tenth of September, 1883, in the afternoon. Evidence was given that one train of two cars drawn by a dummy had come up on the east track on its way to Brooklyn, and had stopped at Thirty-ninth street for a moment or two, the dummy reaching somewhat beyond the north crossing of the street, while the rear end of the rear car was still some 17 or 18 feet south of the south cross-walk; thus totally obstructing the passage on both cross-walks at Thirty-ninth street. The plaintiff was standing on the curb-stone near the south-east corner of the avenue and the street, waiting for the train to proceed on its way to Brooklyn; and just about the time the train started she left the sidewalk, and commenced to cross the street towards the west, and arrived at where the up-train was passing at about the time the rear end of the second car was passing over the crossing, so that she left the north flag-stone of the cross-walk, and stepped to the south one, and passed to the rear of the car, and went towards the west or down track, and just as she stepped towards it she was struck by the dummy, drawing a train coming from Brooklyn, and which she could not see until she stepped from behind the train going to Brooklyn. There was an ordinance of the city put in evidence which provided that "cars stopping at a street intersection shall stop at the further walk thereof, so that the cars shall not when stopped interfere with the travel on cross-streets." The train from the north came down, mak-

ing no noise by either bell or whistle, and was going very slowly in order to stop at the Thirty-ninth street crossing. The crossing at this place was very much used, there being perhaps no other street along the route as much occupied as that. To stop its cars so as to wholly obstruct the street, the effect of which was to prevent persons in the situation of the plaintiff from seeing any train coming from Brooklyn until the same was actually upon them, was certainly a fact proper to be submitted to a jury upon the question of whether the defendant was guilty of negligence in the running or management of its trains.

The defendant claimed that the mother of the plaintiff was guilty of negligence in permitting the child to be at large, and that, as the child was but five years of age, and *non sui juris*, this negligence of the mother was imputable to the child, and she could not, therefore, recover. To rebut this claim of negligence, the plaintiff proved that the mother was unable to hire any servant or person to aid her in looking after the child, and hence it was claimed that, as negligence is to be proved or disproved from all the surrounding circumstances, this evidence of inability was proper. We are not prepared to sustain the correctness of the ruling which admitted this evidence; but it was addressed to the point of showing that the mother was not under the circumstances guilty of negligence, and such fact is entirely immaterial if the child herself was guilty of none. *Ihl v. Railroad*, 47 N. Y. 317. No facts were proved which showed any negligence on the part of the plaintiff. She was on a public street, and about to cross it, and waited for one train to pass the cross-walk on which she was. The street was a crowded one, and she naturally desired to get across it as soon as she reasonably could, and thus get out of danger from the carts, wagons, and other vehicles in such street. As the car reaches her cross-walk she steps from one stone to the other, and passes to the rear, for the purpose of crossing, and is struck by the other dummy before she has

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even got upon the track. In all this she acted as any one might who was taking ordinary care, and who was desirous of getting across a crowded street over a somewhat dangerous crossing as soon as conveniently it could be done.

The greatest difficulty in the plaintiff's case, lies in the charge of the learned judge. He said to the jury that if they found defendant "omitted precautions which they should have adopted in order to prevent injury to people on this highway, then they are responsible." Again he said that "it is for you to say, under the circumstances, whether or not the defendants should have adopted other precautions at this place than those which they did observe."

If the court by this charge submitted the question to the jury to say in a general way what precautions should have been adopted by defendant to prevent injury to the people on the street, it undoubtedly was an error. Under such a charge the jury might find a flagman was a proper precaution, or gates, or that a man should run in front of the cars, or anything else which should commend itself to the judgment of the jury. Such has been held not to be the measure of liability of a corporation in the situation of defendant. *Beiseigel v. N. Y. C. R. R. Co.*, 40 N. Y. 9; *Dyer v. E. R. Co.*, 71 id. 228; *Houghkirk v. D. & H. C. Co.*, 92 id. 219.

We think, however, that such is not the fair import of the charge, taken as a whole. The judge commenced his charge upon this subject by saying that the defendant had a right to operate its railroad over the street in question. The context shows he meant by this nothing more than that the defendant had a right to run its cars over the street; for, he continues by saying, that while a pedestrian or person in a vehicle can avoid the railroad, the engine and cars, on the contrary, are confined to the track; they must run upon that and they cannot turn to the right or to the left. Still, on the same subject, the judge continues and states that the railroad company, while bound to operate its road so as not to injure anybody, yet it was only bound to exercise ordinary care,

and if careful, and still an accident happened, the defendant would not be liable. Then he adds the part objected to, that if on the contrary you find they omitted precautions which they should have adopted, in order to prevent injury to people upon this highway, then they are responsible.

The duty of the company as laid down by the judge in this sentence, seems clearly to be confined to the "operation of its railroad," and we have seen that in using such expression the judge meant only to say that in running its cars, or in their management, the defendant need only use ordinary care, but that if thus running or managing its cars it omitted precautions, which, in the use of ordinary care it should have adopted in order to prevent this injury, then it was liable.

The other portion of the charge relates to the failure to sound the whistle or ring the bell. The charge was explicit that there was no statutory duty to do either, but it left it to the jury to say whether, under all circumstances, they should have adopted some other precautions than those they observed regarding the running of the train. We put the last condition in for the reason already given that the judge used the expression "operate their railroad" as meaning, under the circumstances, run their cars; and with reference to this portion of the charge it is still more apparent that we are right in such interpretation, for, after using that expression, the judge continues with language as to the propriety, or the reverse, of sounding a whistle or ringing a bell in such a thoroughfare, which only applies to the manner of running the cars, and not in the least to the necessity for a flagman, or gates or anything of that nature. And it is thus perfectly apparent that, the question submitted in reality to the jury was as to the lack of any precautions which ordinary prudence would dictate regarding the running of the cars or trains of the defendant.

If this interpretation of the meaning of the charge be the true one, the exception fails. If there be a doubt as to the meaning thereof in that particular, we think that con-

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sidering the language used, the whole spirit of the charge and the context, that the defendant should have not alone excepted generally, but should have gone far enough to call the attention of the court to the real error complained of, viz., that possibly the language might be construed too broadly and as meaning that the precautions to be observed related to the whole general manner of conducting the business of the railroad, and might be thought to include the absence of a flagman or of gates at the crossing, even though in the actual running of the train there was no negligence.

In this case we do not mean to go one step beyond the well settled principles which have been adopted and frequently announced by this court. We simply say that the fair import of the charge, taken as a whole, is in accordance with such principles.

The defendant excepted to the refusal of the judge to charge that the ordinance put in evidence related to railroads operated with horse-power, and not to those operated with steam-power. We think there was no error in such refusal. The other sections of such ordinance showed remedies applicable to railroads operated by horse-power; but they do not control the express language of the section in question, which is broad enough to cover the case of a railroad operated by steam. In addition to that, the place for stopping cars, as provided in the ordinance, would commend itself to the good sense and judgment of every one; and even if there were no such ordinance, the failure of the defendant to operate its train in accordance with such a principle might fairly be submitted to a jury upon the question of its negligence in the management and operation of its trains.

The judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., not voting.

In the Matter of the Application of the WATER COMMISSIONERS OF AMSTERDAM, to acquire title to lands of JOHN CHALMERS, *et al.*

Court of Appeals, February 11, 1887.

Reversing same matter, 36 Hun, 534.

Costs.—The words “with costs” in an order of reversal or affirmance in the court of appeals, in a case where the allowance of costs is discretionary, mean costs in that court only.

See note at end of case.

M. L. Stover, for appellants.

John M. Carroll, for respondents.

PER CURIAM.—In the case of *Sisters of Charity v. Kelly*, 68 N. Y. 628, we construed the words “with costs,” in an order of reversal or affirmance in this court, in a case where the allowance of costs is discretionary, as meaning costs in this court only. The case of *Murtha v. Curley*, 92 N. Y. 359, was one where the prevailing party was entitled to costs as of course, and the decision was placed upon that ground. The rule we established in *Sisters of Charity v. Kelly*, has been followed since the decision of that case, unless by inadvertence. The reversal on the original appeal in this case was “with costs,” and, as construed, entitled the appellant to costs in this court only. If the appellant deemed himself aggrieved, his remedy was to apply to this court for an amendment of the order. The order of the general and special terms should therefore be reversed, and the taxation by the clerk affirmed. But, as the appellant may have been misled by a remark in the opinion in *Murtha*

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v. Curley, as published in 3 Civ. Proc. R. 265, but intentionally omitted in the opinion as published in the regular series, we think the reversal should be without costs

All concur.

NOTE ON THE EFFECT OF THE ORDER OR MEMORANDUM WHEREBY THE APPELLATE COURT AWARDS COSTS ON GRANTING A NEW TRIAL.

There is a conflict in the cases as to the meaning and effect of the terms "with costs to abide the event;" or, "with costs to appellant to abide the event;" or, reversed "with costs," as used in the order of the appellate courts awarding costs, under section 3238 and 3239 of the Code of Civil Procedure.

The said sections read as follows :

§ 3238. Upon an appeal from the final judgment in an action, the recovery of costs is regulated as follows :

1. In an action specified in § 3228 of this act, the respondent is entitled to costs upon the affirmance, and the appellant upon the reversal, of the judgment appealed from; except that, where a new trial is directed, costs may be awarded to either party, absolutely or to abide the event, in the discretion of the court.

2. In every other action, and also where the final judgment appealed from is affirmed in part, and reversed in part, costs may be awarded in like manner, in the discretion of the court.

§ 3239. Upon an appeal from an interlocutory judgment or an order, in an action, costs are in the discretion of the court and may be awarded absolutely, or to abide the event, except as follows :

1. Where the appeal is taken from an order, granting or refusing a new trial, and the decision upon the appeal refuses a new trial, the respondent is entitled, of course, to the costs of the appeal.

2. Where an appeal is taken from an order, refusing a new trial, and an appeal is also taken from the judgment rendered upon the trial, neither party is entitled to the costs of the appeal from the order.

Where a new trial is ordered by the appellate court on an appeal from a judgment, or from an order granting or refusing a new trial, costs are necessarily awarded, but some difference of practice or usage exists as to the exercise of judicial discretion in granting them, whether absolutely to the party succeeding in obtaining a new trial, as a compensation for his labor in vindicating his right to it; or conditionally, in case he succeeds in the final event of the action, upon the view that, if his case is without merit and his appeal is successful only upon technical grounds or for delay, he ought not to have such indemnity; or to the party ultimately successful in the action,

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upon the ground that an appeal resulting in a new trial is only a part of the expense of the litigation, which ought to be thrown on the party unsuccessful, not on the successful party merely because he was unsuccessful in a particular proceeding in the action.

The latter view is the one laid down by the court of appeals in *First National Bank v. The Fourth National Bank*, 84 N. Y. 469, and subsequent cases. The supreme court in the second and third departments, the New York superior court and the New York common pleas have applied the same principle; but the supreme court in their first department has held, as a general rule, that the party unsuccessful on the appeal should not have the costs of the appeal, though he is finally successful in the action.

An award made expressly "with costs to the appellant to abide the event," does not give them in any event to the respondent. It is clear that such language gives the costs in no case to the respondent, though he may ultimately succeed, and that it does give them to the appellant, upon the condition of his success.

Where the language is, "new trial ordered, costs to abide the event," the contrary interpretation would not be improper. In each case, the question depends upon the fact whether the court intended to grant a new trial with costs to the party obtaining it, to abide the event; or to award a new trial, with a direction that the costs shall follow to one or the other party according to the event.

Court of appeals.—In the *Matter of Hood*, 49 Hun, 608, an appeal was taken to the general term from an order allowing costs. The court of appeals had reversed the case with costs. The case was one where costs were discretionary. And it was held that this decision of the court of appeals meant costs in that court only, and the supreme court had no power to allow costs after such a disposition of the case. In *Matter of Water Commrs.*, reported above.

In *Newcomb v. Hale*, 12 Abb. N. C. 338; 64 How. 401, the judgment for the defendant was reversed by the court of appeals, and the plaintiff procured his costs to be taxed by the county clerk, who, against the objection of defendant, allowed the plaintiff his costs and disbursements in the action in the supreme court to the amount \$158. 15. The defence was sustained at circuit and general term, but overruled in the court of appeals, and the latter court, "did order and adjudge that the judgment of the general term of the supreme court appealed from, as relates to defendant Hale, be and the same is hereby reversed and modified, by inserting a provision adjudging the defendant liable for any deficiency, and, so modified, affirmed with costs to the appellant." And it was held that the costs in the court of appeals only are recoverable, not those in the lower court if they were not awarded therein, where the case is one in which the allowance of costs is discretion-

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ary. In *Sisters of Charity v. Kelly*, 68 N. Y. 628, a will was offered for probate and rejected on the ground of defective execution. The supreme court at general term reversed the decree of the surrogate, and the decision of the court of appeals was: "Judgment of the general term reversed, and decree of surrogate affirmed with costs." And it was held that, when costs are given by the judgment of the court of appeals, it means costs in this court to the successful party as against the unsuccessful party. And in *Newcomb v. Hale*, it was said that the court of appeals, in holding, in *Sisters of Charity v. Kelly*, that an order reversing the general term, and affirming a surrogate's decree, "with costs," only gave costs in that court, has so construed words similar to those used in this case, as to render impossible the construction claimed for them by the plaintiff in this action.

It is well settled that, when the court of appeals reverses a judgment "with costs to abide the event," the party who eventually succeeds, recovers costs for all the different steps in the cause. See *First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y.*, 84 N. Y. 469; *Donovan v. Vandemark*, 22 Hun, 307; *Sanders v. Townshend*, 63 How. 343. The costs in the court of appeals are by the order made to depend upon the final event, and, when the final judgment awards to the prevailing party costs of the action, he recovers those in the court of appeals by the force of its order, which gave to the lower tribunal expressed power to award them; and those for the proceedings had in such lower tribunal, because its judgment, giving them, was within its statutory authority over costs for steps taken in an action whilst within its jurisdiction, and under its control.

In *First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y.* *ante*, plaintiff obtained judgment, which was affirmed on appeal to the general term, but it and the judgment of the general term were reversed on appeal to the court of appeals "with costs to abide the event." The new trial was had and plaintiff was again successful, and the clerk allowed and taxed the costs of the appeal to the court of appeals. The special term, on motion, directed a readjustment of costs by striking therefrom the allowance of costs on appeal to the court of appeals. The general term affirmed the order of the special term and an appeal to the court of appeals was taken from the general term order. And it was held that, where an order is made by this court on appeal from a judgment, reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal.

The event of the new trial was the circumstance which was to determine the costs of the appeal to the court of appeals. The order did not limit the recovery of costs to the prevailing party on the appeal, in case he should finally succeed in the action. Appeals are often taken

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for technical errors which do not affect the merits, and, though the appellant is successful, the effect of such appeals in many cases is simply to protract and increase the expense of the litigation. There is generally no injustice in awarding costs on the appeal to the party who shall finally recover. The court of appeals has often limited the recovery of costs on appeal to one of the parties, but, where the order which reverses a judgment and grants a new trial, is made with costs to abide the event, without other limitation, the party finally succeeding in the action is entitled to tax them. This construction was put upon a similar order in *Koon v. Thurman*, 2 Hill, 357. But, in *Union Trust Co. v. Whiton*, 78 N. Y. 491, the court of appeals refused to interfere with the construction given by the general term to its own order. But it is different, where the construction of an order of the court of appeals is involved.

In *Matter of Prot. E. Pub. School*, 86 N. Y. 396, a proceeding was commenced to vacate an assessment in the city of New York. The petitioner succeeded at the special term and the assessment was ordered to be vacated with costs. The city appealed to the general term where the order was reversed, with ten dollars costs to the city. The petitioner then appealed to the court of appeals, which reversed the order of the general term, and affirmed that of the special term with costs. And it was held that this award gave only the costs of the appeal in this court. See *Sisters of Charity v. Kelly*, *ante*; *People ex rel. Morris v. Randall*, 8 Daly, 82.

Upon filing the remittitur, the petitioner, at a special term, entered an order making the judgment of the court of appeals that of the supreme court and concluding thus: "And that the petitioners recover their costs of appeal subsequent to said order." And it was held by the court of appeals that such order merely gives to the successful parties, as their costs of appeal subsequent to said order, such costs as had been legally awarded, or such, if any, as the law fixed and awarded.

In *Murtha v. Curley*, 92 N. Y. 395, a money judgment was recovered against the defendant. From that judgment, he appealed to the general term, where the judgment was reversed and a new trial granted, "with costs to the appellant to abide the event of such new trial." From the order of the general term, the plaintiff appealed to the court of appeals, which reversed the order of the general term and affirmed the judgment of the special term, "with costs." The plaintiff, upon the taxation of costs, sought to tax the costs of the appeal to the general term. But the clerk, upon objection, disallowed such costs. Plaintiff then appealed to the special term, which reversed the ruling of the clerk, defendant then appealed to the general term, which reversed the order of the special term, and the plaintiff then appealed to

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the court of appeals. And this court held that, where a plaintiff is entitled to costs, under § 3228 of the Code, upon entry of judgment in his favor, and such judgment is reversed and a new trial granted by the general term "with costs to appellant to abide the event," but is affirmed on appeal by plaintiff to this court, he is entitled, of course, to the costs of the appeals to the general term and to this court, under § 3238 of the Code.

Supreme Court.—In *Koon v. Thurman*, *ante*, the plaintiff who was nonsuited, made a motion for a new trial which was granted, with costs to abide the event. On the second trial, the defendants obtained a verdict, and the supreme court, upon an appeal from the taxing officer, held that the direction as to costs meant the costs of the motion for a new trial, as well as the costs of the trial itself, and both were allowed to the defendants.

In *Carpenter v. Manhattan Life Ass. Co.*, 25 Hun, 194, it was held that, where a judgment for too small an amount to carry costs, is reversed on appeal, with costs to abide the event, and on a second trial, the plaintiff recovers a judgment sufficient to entitle him to costs, he is entitled to tax costs of the appeal and of both trials.

First department.—In *Howell v. Van Siolen*, 8 Hun, 524, a new trial was granted, upon appeal from a judgment recovered by the plaintiff, "with costs to the defendant to abide the event." Plaintiff recovered a judgment upon the new trial and taxed his costs for both trials. And it was held that he was entitled to do so; and that the order of the general term only deprived him of the costs of the appeal.

The costs in the action are a statutory right dependent upon success except when they are, as in certain cases designated, in the discretion of the court. When the general term grants a new trial with costs to the defendant to abide the event, it was the costs of the appeal and not the costs in the actions which were allowed. The plaintiff having succeeded is entitled to costs, but the defendant having reversed the judgment is allowed costs of the proceeding taken by him for that purpose, provided he succeeds in the action. The plaintiff cannot have them in any event, because he has not maintained his judgment. The defendant was not, when the appeal was taken, entitled to costs; he had not succeeded in the action; and the presumption must be against him, if any is indulged in, where the reversal of the judgment rests upon some error committed upon the trial. He was not the successful party, and still, insisting upon his non-liability for the plaintiff's claim, he demanded a new trial. He was again unsuccessful, and the plaintiff became, by the operation of the statute, entitled to the costs in the action, except the costs of the appeal. The defendant cannot complain if proceedings, which he has rendered necessary by

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his refusal to pay or adjust a legal demand, are attended with expenses which he is required to pay.

This case was affirmed, without opinion, upon an appeal to the court of appeals.

In *Howell v. Van Siclen*, 70 N. Y. 595; 4 Abb. N. C. 1, it was held that, where a judgment in favor of the plaintiff is reversed by the general term, and a new trial granted, "with costs to the defendants to abide the event," this deprives the plaintiff of the costs of that appeal; but that, if he recovered upon the new trial, so as to be entitled to costs, he could have costs of both trials.

In *Provost v. Farrell*, 13 Hun, 303, judgment was rendered, on the first trial before a referee, for the plaintiff in an action of ejectment, and an appeal was taken by the defendant to the general term. The judgment was there reversed on the facts and the law, and a new trial ordered at circuit, "costs to abide the event." On the second trial, a verdict was given for defendant. A motion was then made by plaintiff for a new trial on the minutes, and on the ground of newly discovered evidence, and granted upon payment by plaintiff of \$150.61, costs and disbursements of the action, and ten dollars costs of this motion. On the third trial, a verdict was given for plaintiff for the recovery of the land, without damages. A motion was made by defendant for a new trial on the minutes, and denied without costs. The plaintiff taxed costs for the three trials, and an appeal was taken from the order of the special term readjusting the costs. And it was held that the order granting costs to defendant upon awarding a new trial, in legal effect, determined the right to all the costs of the action which had accrued prior to the entry of such order, except the costs of the appeal, in favor of the defendant. After such order, neither party is entitled to claim costs which had been so adjusted and ordered paid. And the court disallowed the costs of the first and second, and allowed only the costs of the third trial.

In *Union Trust Co. v. Whiton*, 17 Hun, 573, the complaint was dismissed the first trial, judgment suspended, and the exceptions, directed to be heard in the first instance at the general term, where a new trial was ordered, costs to abide event. On the new trial verdict was rendered for defendant and costs were allowed for the appeal to the general term. And it was held that the costs of the general term awarded to the appellant on a former appeal cannot be taxed in favor of the unsuccessful party upon such appeal, though he ultimately prevails in the action.

This case was subsequently appealed to the court of appeals and reported in 78 N. Y. 491, and the appeal was dismissed. The court held that, as the appeal was from the construction of its own order by a general term, which was in accordance with the construction on

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other similar orders, such interpretation would not be interfered with by this court.

In *Jermain v. The L. S. & M. S. B. R. Co.*, 31 Hun, 553, the remittitur from the court of appeals granted judgment absolute upon the stipulation given by the defendant, with costs, and the question was whether the words "with costs" gave to the defendant the costs of the trial in the court below. It was supposed that the right to costs arising from the form of the remittitur has been disposed of against the plaintiff by the case of *Savage v. Allen*, 2 N. Y. S. C. 474, but this view is erroneous. In this case which was an equitable one, the costs of two appeals had been taxed, and the special term, on motion, granted an additional allowance; and the appeal to the general term was from the order granting such allowance only, and the court held that the case was one in which an allowance could not be given, on the ground that the defendant did not recover general costs, but costs of the appeal only. From this it will be seen that the effect of the words in the remittitur "with costs," was not considered, as the appeal related entirely to the order granting the extra allowance. The precise question, however, of the right to costs in such a case, was considered in the cases of *Burdett v. Lowe*, 22 Hun, 588, and of *Parrott v. Sawyer*, 26 Id. 466. In the latter case, in which judgment had been ordered absolute in the court of appeals, with costs, the general term held that the special term had the power, upon the remittitur, to entertain a motion made by the defendants for an additional allowance, and disregarded the cases of *Eldridge v. Strenz*, 39 Supr. Ct. 295, and *McGregor v. Buell*, 1 Keyes, 153, as controlling upon the question. In the case of *Burdett v. Lowe*, the court held that, upon such a remittitur, the judgment embraced all the costs in the action, and that the sureties on the appeal to the court of appeals were liable for them. On the appeal to the court of appeals, 85 N. Y. 241, this judgment was reversed as to the sureties, upon the ground that they were not liable for the costs as sureties, but the right to the costs was not disputed.

In the case of *Von Keller v. Schulting*, 45 How. 139, the general term held that, where judgment was rendered absolute for the defendant, with costs, in the court of appeals, the defendant was entitled to costs from the commencement of the action, notwithstanding that they were in the discretion of the court, and none were allowed to the plaintiff on recovering judgment.

In *Durant v. Abendroth*, 48 Hun, 16, a verdict was directed in favor of the plaintiff for certain causes of action, and for the defendant for other and distinct causes of action, contained in the same complaint. In the adjustment of costs, the costs and disbursements from a preceding judgment in the defendant's favor were allowed to the defendant as part of the costs which he was entitled to recover. But upon

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that appeal the defendant was unsuccessful, and the judgment, which had been recovered in his favor, was reversed. In reversing the judgment and ordering a new trial, the order directed the costs to abide the event of the action. It was held that this direction did not authorize the party, in whose favor the judgment reversed had been recovered, to an allowance of the costs of the appeal, even though he succeeds eventually and finally in the litigation. In the case of *Sheridan v. Genet* (see note to this case in 48 Hun, 17), it was held that the party finally succeeding should not be allowed the costs of an appeal taken to correct an erroneous ruling which had resulted from the position taken by him in the course of a previous trial. It was considered unjust to allow a party, through whose acts costs were needlessly accumulated, to avail himself of the advantage of an indefensible position taken by him, and, in that manner, finally secure their allowance. A direction that the costs of the appeal, resulting in the reversal of the judgment, should abide the event, was not entitled to be construed in such a manner as to give such costs to the unsuccessful party in the appeal. Section 3238 of the Code made them discretionary, and it was regarded as the best exercise of its discretion not to allow such costs to be recovered by the party whose conduct had erroneously subjected the other side to the necessity of incurring them.

A difference of opinion has existed as to the construction of this direction in the order. And in *Comly v. Mayor, etc.*, 1 N. Y. C. P. 306, it was held, at the special term, that the successful party in the litigation might recover such costs. But this is not in harmony with the decision of the general term in the case of *Sheridan v. Genet*, a report of which is contained in a note to the case just cited, (page 309.) The same ruling was followed in *Union Trust Co. v. Whiton*, *ante*; and an appeal from that decision was dismissed by the court of appeals in 78 N. Y. 491, upon the ground that it was for the general term to construe and carry its own discretionary order into effect. On the hearing of the motion at the special term, the conclusion was adopted that the court of appeals had afterwards prescribed a different rule for the construction and effect of this direction in an order of reversal, but this construction was intended to be given only to the orders made by the court of appeals. See *First Nat. Bank v. Fourth Nat. Bank*, *ante*; *Murtha v. Gurley*, *ante*. These decisions apply to the orders of the court of appeals, and not to the orders of the general term of the supreme court. As to these latter orders, no change has been made in the decision declaring it to be for the general term to determine what construction should be given to this language when inserted in its own order.

In *Sheridan v. Genet*, 48 Hun, 17; 1 N. Y. C. P. 309, the plaintiff recovered a judgment for \$51, and the defendant appealed to the gen-

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eral term which reversed the judgment, and granted a new trial, directing in the order of reversal that, "the judgment appealed from be reversed with costs to abide the event, etc." On the second trial, the plaintiff recovered \$69, and the clerk allowed the plaintiff the costs on appeal to the general term amounting in all to the sum of \$125. And it was held that the plaintiff was not entitled to such costs. The costs of that appeal were given to abide the event, that is, to the appellant, if successful, but certainly not to the respondent whose judgment was erroneous, and to correct which the appeal was necessary. The effect of allowing the costs to the respondent would be to make the appellant pay for a perfectly proper proceeding for protection against an unlawful judgment. The defendant is punished sufficiently for defending the action, by imposing the general costs, and by withholding from him the expenses of his appeal to correct the errors committed against him. The cases of *VanWyck v. Baker*, 11 Hun, 309; *Snyder v. Collins*, 12 Id. 383, do not sustain the plaintiff's right to the costs in this case.

On appeal to the general term by the plaintiff from the special term order entered upon this opinion, such order was affirmed upon the opinion of the court below, without costs.

In *Lydd v. Kenny*, 1 N. Y. C. P. 310, judgment was rendered for the defendant dismissing the complaint, on the first trial of this action before a referee. From this judgment, the plaintiff appealed to the general term, which reversed the same and granted a new trial, directing in the order of reversal, "that the said judgment be reversed and a new trial ordered, costs to abide the event." On the new trial which was had before the court, the complaint was again dismissed with costs. In taxing the costs, the clerk allowed the defendant the costs of the first trial, costs of the appeal, and the costs of the new trial. The plaintiff objected to the first two items of cost, and moved for a review of the taxation. The court, at special term, held that the original judgment was set aside, and, consequently, the defendant cannot recover any part of it, whether under the name of costs or otherwise; that this judgment was not, either in whole or in part, revived by the judgment on the new trial; and that the costs of the appeal were given to the appellant, if successful; not, under any circumstances, to the respondent who was defeated.

In *Comly v. The Mayor, etc.*, of New York, 1 N. Y. C. P. 306, the court directed a verdict for the plaintiff. And from the judgment entered thereon, the defendants appealed to the general term which reversed the judgment, directing in the order of reversal, "that the said judgment appealed from as aforesaid, be, and the same is, hereby reversed, and that a new trial be, and the same is, hereby directed to be had herein, with costs of this appeal to abide the event."

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The judgment in this case was not reversed, with costs to abide the event; it was simply reversed and a new trial ordered, and the court added a direction that the costs of this appeal abide the event. This means to the party ultimately successful. Otherwise, the order would have read, costs to the appellant to abide, etc., or reversed, with costs to abide, etc. In the latter case, the supreme court of the first department has held that costs on appeal given to abide the event are not given to the party unsuccessful on such appeal, though he may ultimately recover judgment; see *Union Trust Co. v. Whiton, ante*, and the court of appeals has sustained this ruling, on the sole ground that it would not disturb the construction by the general term of its own order; see *same case*, 78 N. Y. 491, but said court reversed the decision of this department when it construed the order of that court in the same manner. See *First Nat. Bank v. Fourth Nat. Bank, ante*. And this department held, however, that the intention of the court in phrasing the present order was to leave the costs of the general term to the party ultimately successful.

In *Schoonmaker v. Bonnie*, 51 Hun, 34, an action was brought to compel a specific performance of a contract for the sale and conveyance of land. The trial court awarded judgment against the defendant. But on review of that judgment by the general term, it was held that the wives of the defendants could not be compelled to release their inchoate right of dower in the land, and the judgment of the trial court was, therefore, reversed as to them, with costs. The question raised by this appeal was as to what was meant by the term "with costs."

The costs were in the discretion of the court. The reversal of the judgment by the general term as to the wives of defendants was a holding, in effect, that the trial court should have dismissed the complaint as to them; and the reversal without granting a new trial was, in effect, the ordering of judgment in their favor; and had the judgment of the general term provided that the judgment of the trial court be reversed, and final judgment ordered for these defendants, with costs, they would have been entitled to tax the costs allowed by the Code in the trial court. The judgment of the general term, in reversing the judgment as to these defendants, did not, it is true, order, in expressed terms, final judgment in their favor; yet such was the effect of the judgment entered, and the same results should follow in reference to the taxation of the costs. And it was held that, in ordering judgment for the defendants for a dismissal of the complaint, with costs, it must be understood to include all the costs that were taxable in the supreme court, including that of the trial and of the court in review. In the court of appeals, in equity actions, the words "with costs," as used by that court, only mean the costs in that court. See *Matter of the Water Commrs., ante*; *Sisters of Charity v. Kelly, ante*. But the

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court of appeals is a separate, independent court. The general term is but a branch of the supreme court, in which court the action was tried.

Second department.—In *Van Wyck v. Baker*, *ante*, an action was brought by a judgment creditor to set aside a conveyance of land made by the debtor on the ground that it was fraudulent. The plaintiff recovered a judgment, which was, upon appeal, reversed by the general term and a new trial ordered, costs to abide event. Subsequently, on plaintiff's application, the special term directed that the action be discontinued without costs to either party. Upon appeal, it was held that the action was one in which a claim of title to real property arises on the pleadings, and that the successful party is entitled to costs therein as matter of right; and that, under the order of the general term, in whatever manner the action might eventuate, whether by judgment or discontinuance, the prevailing party would be entitled to costs; and that an order permitting a discontinuance, without costs, is a substantial modification of the order of the general term.

In *Snyder v. Collins*, *ante*, an action was brought against the defendant for assault and battery and false imprisonment. The plaintiff, at the first trial, was nonsuited. Upon appeal to the general term, the nonsuit was set aside and a new trial granted, "costs to abide event." Upon the second trial, the plaintiff obtained a verdict for ten dollars, and upon this verdict, taxed the costs of the appeal to the general term and entered judgment. The special term ordered the retaxation of the costs, and directed that there should be no more costs than damages included in the judgment. On appeal to the general term, it was held that the special term order was right; and that the event, upon which the costs of the appeal depended, was an event which should entitle the plaintiff to costs by law; and that this event never happened to him to an extent greater than ten dollars.

In *Bigler v. Pinkney*, 24 Hun, 224, plaintiffs had judgment on the report of a referee, and defendant moved for an order requiring the referee, to make further findings and was refused. He then appealed to the general term from this order of denial, and from the judgment, both of which were affirmed, and thereupon the defendant took an appeal to the court of appeals where both were reversed, with the direction that the defendant have costs of the appeal from the order in both courts, and that the costs of the appeal to the court of appeals from the judgment should abide the event of the action. The costs of the appeals from the order were adjusted and paid. A reargument was had at the general term, which resulted in the affirmance of the judgment, and the plaintiff thereupon taxed costs of the appeal from the judgment of the general term, of the appeal to the court of appeals and of the reargument of the general term. And it was held at general term that the

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objection to the allowance of costs in the court of appeals cannot be sustained. Under the decision of that court, they went to the party eventually succeeding in the action, and so far the plaintiff was successful.

As to the allowance of the costs in the general term to plaintiff a more serious question is presented. The plaintiff there had a judgment of affirmance, and the order entered on the decision of the court of appeals provided that such judgment be, and the same is, hereby reversed, with costs to the court of appeals to abide the event of the action. As this is an action of law, costs follow success; but in this court the plaintiff sustained defeat. The decision of the court of appeals does not make the costs of the action abide the event, but only the costs of that court, and there has been no decision affecting the costs in the general term. As the judgment of the plaintiff in this court was reversed, he cannot be allowed costs of the general term.

In *Thomas v. Evans*, 50 Hun, 441, judgment, at the first trial, was awarded to the plaintiff with costs in an equity action. The general term affirmed the judgment, with costs. An appeal was taken to the court of appeals and resulted in a new trial being ordered, "with costs to abide the event." On the new trial, judgment was rendered for defendant, with costs. The clerk taxed costs of the first trial, the general term, the court of appeals and the second trial, in favor of defendant. Special term disallowed the costs and disbursement of the general term, but allowed costs of the first trial, the court of appeals and the second trial. Both parties appealed from the special term order to the general term. And it was held that, while the case of the *First Nat. Bank of Meadville v. Fourth Nat. Bank of N. Y.*, *ante*, is decisive that the party, which has at last prevailed, is entitled to his costs of the court of appeals, it does not hold that the decision of the court of appeals, reversing a judgment and ordering a new trial, "with costs to abide the event," necessarily imports that the party finally prevailing must recover costs for all the proceedings in the cause.

Full effect is given to the language of the appellate court, by giving to the party successful on the last trial his costs in the court of appeals.

The judge who tried the cause has authority to give the party now prevailing costs of the first trial at special term, as the cause is in equity and the costs are in his discretion.

The right to the costs of the appeals to the general term was not conferred by the decision of the court of appeals. As they have not been awarded to the party now prevailing by the general term, nor by the decision of the special term, the party is not entitled to them.

In *Marx v. McCloud*, 50 Hun, 805, the judgment of the county court, rendered in this action originally, was reversed on appeal to the gen-

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eral term of the supreme court, and a new trial was granted, with costs to the appellant to abide the event, and thereafter a new trial was had which resulted in a verdict for the defendant. And it was held that the appellant was not entitled to the costs of the appeal to the general term, because he did not succeed finally in the action. If the plaintiff had succeeded on the new trial, he would then, it seems, have been entitled to the costs of the appeal; but the event of both trials, having been unfavorable to him, and favorable to the defendant, he can recover no costs of the appeal, since such costs were in terms to the appellant to abide the event.

Third department.—In *Donovan v. Vandemark*, *ante*, an action was brought to recover a tract of land, and plaintiff's right depended upon the validity of a trust contained in a will. Upon the first trial, the justice held the trust invalid and ordered judgment for the defendant. The plaintiff appealed to the general term, where the judgment given at the circuit was affirmed, and then appealed to the court of appeals, where the judgment appealed from was reversed, and a new trial granted, with costs to abide the event. The judgment of the court of appeals was, by an order, duly made the judgment of the supreme court. Upon the second trial, the justice gave judgment for the plaintiff, with costs; and the defendant, upon taxing the costs, objected to the plaintiff's taxing the costs incurred at general term, on the ground that the plaintiff had not there been successful. The clerk allowed them, and the defendant then moved at special term, where an order was granted disallowing those costs, and from that order the plaintiff appealed to the general term. And the court held that the plaintiff was entitled to all the costs of the action, including all costs in the progress of the case.

In *Halck v. Reinheimer*, Supm. Ct. Third Dept., February, 1888, plaintiff was beaten in an equitable action, both in the trial court and at general term and no costs were awarded him. He had no occasion or opportunity, to ask for costs in the supreme court, before the decision of the court of appeals where he was successful, with costs awarded to him. And it was held that he was not entitled to costs in the supreme court on appeal by virtue of the decision in his favor in the court of appeals, but only to such as accrued in that court; but after the rendering of that decision, opportunity should be granted him to ask for costs.

Superior Court of New York.—In *Donovan v. The Board of Education* etc. 1. N. Y. C. P. 311, the complaint was dismissed on the first trial, and the exceptions ordered to be heard in the first instance at the general term, which sustained the exceptions and ordered a new trial, with costs to the plaintiff to abide the event. Prior to the new trial, the defendant was allowed to amend its answer on payment of the costs

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of the first trial, after notice of trial, and the costs of appeal. On the second trial, the complaint was again dismissed, and the clerk, in taxing the costs, allowed the defendant the costs of the first trial, the costs of appeal, and the costs of the second trial. The plaintiff objected to the allowance of costs of the first trial, after notice of trial, on the ground that they had been paid by the defendant for the privilege of amending its answer; and to the allowance of the costs of appeal, on the ground that, having been specifically awarded to him in the event of his success, they could not be taxed in favor of the defendant. And it was held by the N. Y. Supr. Ct. at special term, that, under the decision made by the supreme court in *Howell v. Van Siclen*, *ante*, affirmed by the court of appeals in 70 N. Y. 595, and the decision made by the general term of the New York Superior Court, in *Isaacs v. The N. Y. Plaster Works*, 43 N. Y. Supr. 397, the items objected to were properly allowed, with the exception of those relating to the costs and disbursements at general term. These, in the exercise of the discretion possessed by the general term, were not awarded generally, or to either party to abide the event, but only to the plaintiff in case he should finally succeed in the action, and consequently, they cannot be taxed by the defendant.

Under the former Code, it was held that, where the general term reversed a judgment and ordered a new trial, with costs to the appellant to abide the event, the respondent, having again succeeded upon the new trial, could not tax costs for the proceedings that had been vacated for error. *Cochran v. Gottwald*, 42 Super. Ct. 214.

And where the court of appeals, affirming an order for a new trial directs judgment absolute for the plaintiff with costs, this carries to the plaintiff all the costs of the action, from the beginning to the end, except such costs as, subsequent to the decision of the court of appeals, are specially adjudged to the defendant. *Rust v. Hauselt*, 46 Super. Ct. 38.

Where the appellate court grants a new trial, with costs to abide the event, the direction refers to the costs of the appeal; and where the respondent recovers on the second trial, it was held, in *Isaacs v. N. Y. Plaster Works*, *ante*, that he may include in his costs, the costs allowed to him by the reversed judgment.

And on an appeal in the last case in 4 Abb. N. C. 4, it was held that where, on the first trial the defendant recovers, and has judgment for costs, which is affirmed with costs at the general term, and reversed by the court of appeals, and a new trial ordered, with costs to abide the event, and on the new trial the plaintiff recovers only nominal damages, so that the plaintiff is entitled to costs, the latter may tax costs of both appeals and both trials.

Where the general term reversed a judgment for the plaintiff, "with

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costs to the defendant to abide the event," and afterwards, while the issues were pending for a new trial, the special term, on motion of the defendant, allowed them to amend their answer upon payment of the costs of the action to the present time, not including allowances; and it was held, in *Havemayer v. Havemayer*, 44 Super. Ct. 170, that this special term order did not deprive the defendants of the costs, awarded to them contingently by the general term order.

New York Common Pleas.—In *Sanders v. Townshend*, 11 Abb. N. C. 217, a judgment was entered from which plaintiff appealed to the general term, where the judgment was reversed, and a new trial ordered, with costs to abide the event. Upon appeal by defendant to the court of appeals, the order of the general term was reversed and the judgment at circuit affirmed, with costs. And it was held that defendant was entitled to costs of the appeal to the general term. The event, i.e., the result of the litigation, was that the defendant obtained judgment. The costs of the appeal to the general term abided, i.e., depended upon, the final result of the litigation, and, when that result was reached, the party who prevailed became entitled to the costs of the appeal to the general term.

Where, upon an appeal to the court of appeals a new trial was granted with costs to abide the event, the party who succeeds upon the new trial, whether he was appellant or respondent, was held, in *Mott v. Consumer's Ice Co.*, 8 Daly, 244, to be entitled to the costs of the appeal and of both trials.

And an order of the court of appeals, reversing an order of the general term, and denying a motion with costs, was held, in *People v. Randall*, 8 Daly, 81, to give the party costs of the court of appeals only.

Marine Court.—In *Lottl v. Krakner*, 1 N. Y. C. P. 312, the plaintiff recovered a judgment in an action of conversion for \$300. Defendant moved for a new trial, which was denied, and then appealed from the judgment and order to the general term, which reversed the judgment and order as follows: "It is ordered that the said judgment and order be, and the same are, hereby reversed, and a new trial ordered, with costs to abide the event of the action." A second trial was had and resulted in a verdict for the plaintiff. His costs were taxed by the clerk and embraced the costs of two trials and of the appeal. The special term ordered a readjustment of the costs by the omission of the costs of the former trial and of the appeal. From this order an appeal was taken to the general term. And it was held that, though the order of the general term did not provide whether the costs were to go to the appellant or to the respondent, the proper rule of construction is that, when the order is silent in this respect, the costs, by necessary implication, go to the party who finally succeeds, because he

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is the prevailing party within the meaning of the various provisions in regard to costs. The plaintiff having succeeded upon the second trial, became entitled to tax all the statutory costs allowed by law to a prevailing party under like circumstances, and there was no longer any discretion in the court as to the amount of the items specified. The statute fixes the rate which is unalterable by the court. See *Downing v. Marshall*, 37 N. Y. 360. The general term exercised the discretion vested in it, when it awarded costs of the reversal "to abide the event of the action." The event has transpired, the plaintiff has prevailed, and the plain duty devolved upon the clerk to tax the items of the plaintiff's costs as allowed by statute, according to the prescribed rate.

N. Y. City Court.—In *Bannerman v. Quackenbush*, 2 City Ct. 172, it was held that, where the defendant is defeated at the trial, and succeeds upon appeal in having the judgment reversed, with costs "to the appellant" to abide the event, and the plaintiff succeeds upon the new trial, he cannot tax in his favor the costs of the appeal. This decision was affirmed in 17 Abb. N. C. 103.

Subd. 1 of § 3238 of the Code is not restricted to causes brought in the supreme court, a superior city court, the marine court of New York city, or a county court, by force of subd. 13 of § 3347, which limits the application of § 3228, referred to in subd. 1 of the former section. Upon an affirmance, by the supreme court, of the determination of a county court upon an appeal from a justice's court, it was held in *Combs v. Combs*, 25 Hun, 279, that the right to costs was regulated by § 3228, and not by subd. 2 of § 3238, so that, where they are not given by the decision upon the affirmance, the costs of the appeal must nevertheless be allowed on affirmance. See also *Clark v. Carroll*, 61 How. 47.

Opinion of the Court, by FINCH, J.

THE MANCHESTER PAPER COMPANY, Appellant, v. JACOB
R. MOORE, as Administrator, etc., Respondent.

Court of Appeals, March 1, 1887.

1. *Account stated.*—Accounts rendered monthly for four years, and after examination retained without objection, constitute accounts stated, and can only be opened and investigated upon proof of fraud or mistake.
2. *Evidence. Ambiguous terms.*—The words “ruling market rates” used in a written contract, where there were two market rates, one for the goods as bought of importers, and another for same goods as sold by jobbers, may be explained by the conversations of the parties, the surrounding circumstances, the characteristics of the business conducted by each, and their relative needs and modes of action.

Appeal from a judgment of the general term of the New York Superior Court, affirming a judgment entered on the report of a referee, dismissing the complaint upon the merits

Henry L. Burnett, for appellant.

M. W. Divine, for respondent.

FINCH, J.—The accounts rendered monthly during four years by Jessup and Moore to the plaintiff, and after examination retained without objection, constituted accounts stated and could only be opened and investigated upon proof of fraud or mistake. The plaintiff evidently recognized this feature of the situation, for the complaint expressly charges fraud or mistake in the rendition of the accounts, and the denial of the defendant put that issue into the case. The items assailed as thus fraudulent or mistaken were the chemicals furnished at the prices charged, and the computations of interest. The contract between

the parties was embodied in a letter written by the defendant referring to previous conversations and purporting to frame their meaning into the terms of a written agreement. Among those terms it was specified that the supplies for the plaintiff's paper mill were to be furnished by the defendants at the "ruling market rates." The evidence discloses that the market rates for chemicals bought of importers was a fraction below the market rates for the same goods as sold by jobbers among the other supplies necessary to the manufacture of paper.

The fact thus disclosed raised a latent ambiguity in the language of the written contract, and opened the inquiry which of the two market rates was meant or intended by the terms of the contract. The previous conversation of the parties tending to show in what sense the subsequent words as written were understood, and bearing upon the issue of fraud between the parties only to be investigated by a complete survey of all that occurred relating to the transaction were admissible in evidence. When these conversations were first offered the defendant objected upon the ground that the terms of the writing could not be varied or contradicted by parol proof. The court expressly declined to receive the evidence for any such purpose. The defendant conceded by the form of his objection, in which he insisted that the question asked "should be confined to the explanation of some phrase in the written contract" that so much of the conversation as tended to such an explanation was admissible. The evidence thereafter given did not transgress this limitation. It exposed the situation of the parties, the surrounding circumstances, the characteristics of the business conducted by each, their relative needs and modes of action, thus enabling the court to read the instrument from the standpoint of the parties themselves. The conversation developed that by ruling market rates the parties meant and intended the jobbers' rates as established by those who, like the defendants, were engaged in

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furnishing paper makers' supplies generally and of all kinds, and not the importers' rates for chemicals alone, and showed, further, that the defendants in charging jobbers' rates were guilty of no fraud but conforming to an understood and expressed intention. We think, therefore, that no error was committed in admitting the evidence objected to, nor in holding that the rates charged were in conformity to the terms of the contract, and not fraudulent or mistaken. In *Dent v. N. A. Steamship Co.*, 49 N. Y. 390, the offer rejected was to show the prior parol agreement of the parties. The effort was to substitute the verbal language for the written language of the contract, which of course was inadmissible. Facts existing, it was said, might be shown in aid of interpreting the written words, but not different language as constituting the agreement. In the present case the accounts stated conclusively interpreted the instrument, unless they were fraudulent or mistaken, and upon that issue all that was said and done leading up to the written contract and tending to establish the absence of fraud in the charges made, was certainly admissible.

The same thing is true as to the manner of computing interest. It is proved that the defendants showed and carefully explained to the superintendent of plaintiff their interest computations with their own mill and their mode of charging the same as an illustration of the manner in which they proposed to conduct the business, to which the superintendent assented. Three computations appeared upon fifty-four different accounts running through the entire business relation of the parties, and the finding of the referee that such accounts were neither fraudulent nor mistaken leaves them binding upon the parties. The judgment should be affirmed, with costs.

All concur.

Statement of the Case.

HENRY TOZER, by Guardian, etc., Respondent, v. THE NEW YORK CENTRAL and HUDSON RIVER RAILROAD COMPANY, Appellant.

Court of Appeals, March 8, 1887.

Reversing same case, 38 Hun, 100.

Evidence. Utterior consequences.—In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, testimony as to the ulterior consequences, which may ensue or be apprehended from the injuries received by the plaintiff, is inadmissible, unless there is such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered upon a verdict, and from an order of the general term affirming a special term order denying a motion for a new trial made on a case and exceptions.

The facts and opinion of the general term are as follows :

"In the evening of the 17th of June, 1881, the plaintiff, then at the age of nine years, and his brother aged seventeen years, in a wagon drawn by a horse, driven by the latter, were proceeding southerly in Cemetery street, in the village of Batavia, across the track of the defendant's railroad, and were struck by the tender of what was known as a pusher locomotive engine, which was somewhat rapidly moving backwards on one of the tracks. The plaintiff was seriously injured and his brother killed. There were at that place five parallel tracks of the defendant's road, and the accident occurred on the fourth track from the north.

"The evidence justified the conclusion that the injury was

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occasioned by the negligence of the defendant, and without fault on the part of the plaintiff. The plaintiff recovered a verdict of \$8,000.

"The main questions on appeal arise on exceptions taken to the admission of testimony of witnesses. It appeared that the plaintiff was injured in the head, right leg, right arm and elsewhere; that the injury to his brain was such that he was utterly unconscious for three weeks after it occurred and semi-unconscious for three weeks after that, and for weeks thereafter his talk was confined to monosyllables; that the injury to the brain was of a permanent character, and such as to impair his memory and hearing; that before the injury he was fond of his books, attended school, learned rapidly and was a good scholar, and had a good memory; that since the injury he has suffered with roaring noises in his head, impairment of vision, cannot learn or remember his lessons, and study causes an uncomfortable feeling in his head; that since the injury he was fretful, nervous and easily excited, and was not so before.

"The evidence apparently had relation to his condition up to the time of the trial, which was in June, 1882, a year after the injury. A doctor was asked to state whether there was a probability that some disease of the brain, even after the lapse of a year from such an injury and apparent recovery, would carry off the person so injured, and he answered that such things do occur. He is then asked: 'State whether it is probable they may occur in this case, or whether you would expect that to occur or whether there would be any more than a remote liability,' and he answered: 'There is a liability of their occurring.'

"The defendant's objection to the answer being received and overruled, exception was taken.

"He is then asked: 'State whether there is a probability from such an injury of disease of the brain manifesting itself at a remote period, years after the injury, and if so, tell us what you know on that subject.' He answered:

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‘I do not think there is a probability of its occurring. It would be more likely to occur than as though he hadn’t received the injury.’ Q. State whether ordinarily this irritability and nervousness after a lapse of a year might assume a progressive form and grow worse instead of better? A. That would be rather difficult for me to say. Taking into consideration the boy’s age and his natural inherited qualities, he probably will improve somewhat, and perhaps entirely recover. To the last two questions objections were respectively made, overruled and exceptions taken. He was re-examined by plaintiff, as follows: Q. You may state the probability, and if there is any, of insanity following injuries to the head of the character you have described? A. I wouldn’t want to answer the question that way, and say it was probable, because a person had injury to the brain, that he would become insane. I say they may become insane from injury to the brain. Q. State for what period of time such a thing may be apprehended. A. There is no period of time. Q. Does such a thing ever follow an apparently complete recovery? A. I think such cases are recorded. I never have had any occur in my practice. It is generally conceded, I think, by physicians, that such things may occur. Objections and exceptions were taken to the reception of answers to those several questions. Another doctor testified that if anything should result from the injury to the brain of the plaintiff it would indicate itself by loss of memory and periods of undue excitement and impairment of vision to some extent, and possibly the hearing. Q. State what you think would be the probable result? A. I don’t know but that covered the ground. I don’t know that anything more might be expected, and probably happened. Q. You may state whether there may be an apparent complete recovery when there is not an absolute recovery. A. I can say there can be an apparent freedom of symptoms at one particular time, and then they may be re-developed at an interval. Q. They may be re-

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developed after years? A. Possibly. The defendant's objections to those several questions were overruled and exception taken. The court at general term said: "It is contended by the defendant's counsel that much of this evidence offered and received was incompetent because it did not have the requisite character of certainty or even of probability in respect to future results of the injuries received by the plaintiff, and that it may have had the effect to enhance the damages found by the jury. The plaintiff had the right to prove damages, both past and future, as the result of the injuries suffered by the plaintiff, but the evidence on that subject must be such as may advise of the necessary probable and expected consequences of the condition in which the injury placed the plaintiff as distinguished from those that may be deemed merely possible or speculative. *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305.

"There may be results which naturally follow physical injuries, and may reasonably be apprehended from the condition occasioned by them. The judgment of men skilled in medical science is necessarily resorted to, and competent as evidence in that respect, and the purpose of that referred to was to show the extent of the injuries and their effect upon his future health and condition. So far as the questions put to those witnesses were competent, there was no error in permitting them to answer. The competency of the evidence given in response to them was a question to be presented by motion to strike out, or upon request to charge. The inquiry of the witnesses for the probable consequences of the injuries, we think, was competent, and that was the character of most of them to which objection was taken. That is one method of expressing what may reasonably be expected to follow as the natural effect of the causes upon which the judgment called for is predicated, and furnishes evidence as definite in quality as ordinarily is given by opinions of the future consequences of brain and

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other physical injuries. And while the entire correctness of opinions may not be demonstrable, and they may not have the merit of absolute certainty, they constitute the best and only means of furnishing proof on the subject for the consideration of the jury who are to give such damages for the future effects of the injuries as are reasonably certain. *Buel v. N. Y. Central R. R. Co.*, 31 N. Y. 314; *Filer v. N. Y. Central R. R. Co.*, 49 id. 42-45.

The following questions considered alone and independent of any other examination of the witnesses would seem to be incompetent: "Does such a thing ever follow an apparently complete recovery?" You may state whether there may be an apparent complete recovery when there is not an absolute recovery?" "May they (symptoms) be redeveloped after years?" These questions called for a possible condition which might follow injuries and appear in future as a consequence of them. They were not in terms applied to the plaintiff or his injuries, but were, in effect, inquiries whether sometimes there was, or not a deceptive condition of recovery followed by a reappearance of results of previous injury. The evidence given in response to those questions did not furnish any legitimate information; and treating it as incompetent, the question arises whether the objections were such as to produce error. The objections taken were general. As a rule the grounds must be specific, to which there are exceptions, and it is contended that these come within the latter. It was competent to take opinions of the witnesses on the subject of the extent and future consequences of the injuries in question. The witnesses, as will be assumed, were competent to express them, and the plaintiff might have proved, if he could, that the nature of the injuries received by him were permanent in character, and that his apparent recovery could not be real or substantial. While the opinion asked for was irrelevant, it was not incompetent to call for the judgment of the witnesses relating to the effect which would follow his in-

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juries. It cannot, therefore, be said that the objection could not have been obviated if the specific ground of objection had been stated. *Levin v. Russell*, 42 N. Y. 251, 255-6; *Daly v. Byrne*, 77 id. 182-187; *In re Crosby v. Day*, 81 id. 242-245; *Ward v. Kilpatrick*, 85 id. 414-417. Nor can it be said that the evidence was in its essential nature so incompetent that no question was admissible on the subject involved in it as relating to the plaintiff's condition. The difficulty was in the form of the question, and in calling for a speculative opinion rather than one based upon his case applicable to him and to the consequences which, in the judgment of the witnesses, would follow. These objections do not come within the exception to the general rule, which requires a specific ground of objection to support error. *Bergmann v. Jones*, 94 N. Y. 51; *Quimby v. Strauss*, 90 id. 664; *Stevens v. Brennan*, 79 id. 255; *Tooley v. Bacon*, 70 id. 34. The same suggestions are applicable to the other objections taken to the admissibility of evidence.

George C. Greene, for appellant.

Wm. C. Watson, for respondent.

PER CURIAM.—This case falls within our decision in *Strohm v. N. Y., L. E. & W. R. R. Co.*, 96 N. Y. 305. The testimony which was received under exception, as to the ulterior consequences which might ensue or be apprehended from the injuries received by the plaintiff, was quite as objectionable as that for the reception of which the judgment in the case cited was reversed.

The judgment appealed from should be reversed and a new trial granted, costs to abide the event.

All concur.

HENRY J. BOOKMAN, Appellant, v. LOUIS R. STEGMAN,
Sheriff, etc., Respondent.

Court of Appeals, March 22, 1887.

Reversing same case, 40 Hun, 636, mem.

Evidence. Hearsay.—A conclusion reached by a judicial officer upon *ex parte* affidavits, to the effect that they contained sufficient evidence to prove an indebtedness from one party to another and the perpetration of frauds by the debtor in incurring it, is not competent evidence, in an action between third parties, to establish either the fact of such debt or of such frauds. Such proof is mere hearsay.

Appeal from a judgment of the general term of the supreme court, affirming judgment and order denying a new trial.

William J. Gaynor, for appellant.

James Troy, for respondent.

RUGER, Ch. J.—The plaintiff brought an action of claim and delivery to recover possession of a quantity of liquors, etc., of the value of \$3,500, which he alleged the defendant had wrongfully taken from him and wrongfully detained. The answer justified the taking of the property, as sheriff of Kings county, by virtue of two several attachments issued out of the supreme court, respectively commenced by Thomas & Thomas against Midas & Larson, and Henriques against Midas, and claimed that the same was the property of Midas and not of the plaintiff. The evidence upon the trial was uncontradicted, to the effect that the property in question, on or about December 18, 1884, was taken by the defendant from premises on the corner of Atlantic and

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Georgia Avenues in East New York, in which the plaintiff was carrying on the business of selling wines, liquors, etc., at wholesale and retail and consisted of his stock in trade.

It also appeared that the plaintiff was then in possession of said premises, and had been since October 1, 1884, under a lease standing in his own name and paying rent therefor, and that his name was conspicuously painted upon the outer wall of the building, and several smaller signs were displayed in different parts of the store, and he was apparently having exclusive control and management of the business.

It further appeared that about a year and a half previous to this time one Bernhard Midas, in connection with a much larger establishment situated in another part of the town, had conducted this store; but desiring to remove his business wholly to Brooklyn, he sold its good will and contents and assigned his lease to the plaintiff and delivered possession thereof, and about the first day of November thereafter established himself in the liquor selling business in Brooklyn.

It was further proved by the plaintiff that the purchase-price of said stock, etc., was \$3,316.90, and that he paid therefor by \$1,000 in cash; canceling a debt owing him by said Midas of \$1,000, and delivering his own note for the balance, \$1,316.90, indorsed by his father, a responsible man.

It also appeared that between the middle of October and the twelfth day of November thereafter, the plaintiff bought other liquors of Midas, for the use of his said business, to the amount of nearly \$6,000, \$2,500 of which was paid by the promissory note of third parties, and the balance by the notes of the plaintiff on four months' time. These notes were all subsequently paid at maturity at the banks where they were made payable, except a small note which had not become due on the day of trial.

The ground upon which the defense was conducted was the claim that each of the sales from Midas to the plaintiff was fictitious—made with intent to defraud the creditors of

Midas—and that the liquors themselves continued to remain the property of Midas.

Assuming for the present that the defendant could, without confessing and avoiding the allegations of the complaint, give evidence of fraud which would avoid the transfers from Midas to plaintiff, we are of the opinion that the evidence given for that purpose was very weak and unsatisfactory. No direct proof was offered of any arrangement between Midas and plaintiff that Midas should retain an interest in the property sold, and no circumstance transpired after the sale tending to show that he exercised any control over the same or received any of the proceeds of the business.

Aside from the fact that plaintiff was an adopted child and nephew of Midas, generally living in his family, and superintended the store in question while he carried it on, and some slight discrepancies in the evidence of the plaintiff, not a fact appeared casting suspicion upon the transactions or tending to show that Midas was not perfectly solvent and able to respond to all of his engagements, not only at the time of making the sales, but also at the date of the attachment, except the fact that about the middle of December the sheriff received some fifteen or sixteen attachments from as many different parties, amounting to about \$72,000, against the property of Midas, issued upon the ground of frauds alleged to have been committed by him, and commanding the sheriff to attach his property.

This evidence was testified to by the under-sheriff, claiming to hold the several attachments in his hands and speaking therefrom, and was objected to by the plaintiff. They were offered, and admitted, upon the ground that they bore upon the alleged fraud of Midas; and the plaintiff excepted to the ruling.

The defendant also offered the several affidavits upon which the respective attachments were founded, but, upon objection being made by the plaintiff, they were withdrawn.

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The attachments were, however, allowed to remain as evidence in the case, purporting to prove that they were each issued on account of alleged frauds of Midas, and apparently showing an indebtedness on his part of \$72,000 to the several plaintiffs in such attachments. These attachments did not comprise the process under which the defendant justified the seizure of the property, but were claimed to be other process in his hands at the time thereof.

It cannot be doubted but that this evidence was very material upon the issue presented by the defendant, and if it was improperly admitted had a very injurious effect upon the result of the trial for the plaintiff.

We are clearly of the opinion that this evidence was incompetent for any purpose. A conclusion reached by a judicial officer upon *ex parte* affidavits, to the effect that they contained sufficient evidence to prove an indebtedness from one party to another and the perpetration of frauds by the debtor in incurring it, is not competent evidence to establish either the fact of such debt or of such frauds, in an action between third parties.

Such proof derives no force from the judicial order, and is merely hearsay, having no greater effect, as proof of the facts stated therein, than *ex parte* affidavits made under any other circumstances.

No statute makes them evidence and no rule of common-law evidence justifies their admission. *People v. Walsh*, 87 N. Y. 485.

The fact that a judge has awarded process thereon, constitutes no such adjudication as renders them evidence of the facts stated therein.

For this error the judgment should be reversed and a new trial ordered, with costs to abide event.

All concur.

THE PEOPLE *ex rel.* LUCY ALLEN, Respondent, v. WILLIAM
H. ALLEN, Appellant.

Court of Appeals, March 25, 1887.

Appeal. Custody of children.—Where the courts below, upon a view of all the existing facts relating to the welfare and interests of the infants, had exercised their discretion in awarding to the mother the custody of the children, without assigning, to an Illinois decree, awarding to her the custody, the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarding it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it, the court of appeals dismissed the appeal.

Appeal from an order and judgment of the general term of the supreme court, affirming a special term order, awarding the custody of infant children to their mother.

Theo. Bacon, for appellant.

John M. Davy, for respondent.

PER CURIAM.—We dismiss this appeal for the reason that the courts below, upon a view of all the existing facts relating to the welfare and interest of the infants, exercised their discretion in awarding to the mother the custody of the children; and in so doing gave to the Illinois decree not the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarded it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it.

Appeal dismissed, with costs.

All concur.

Opinion, *PER CURIAM*.

ISAAC B. ELLSWORTH *et al.*, Respondents, v. THE ÆTNA
INSURANCE COMPANY, Appellant.

Court of Appeals, March 25, 1887.

Affirming same case, 37 Hun, 638, Mem.

Evidence. Best possible.—Where in an action upon a policy of insurance on a stock of goods, the pass books, bills of purchase of goods, and other books save the inventory book which contained an inventory taken by plaintiff's vendors ten months before the fire, were destroyed by said fire, the plaintiffs were allowed nine years afterwards, in order to prove the value of goods burnt, to introduce in evidence the above mentioned inventory which they assisted in making, and also the footings of an inventory, made by themselves a few days before the fire, entered in pass-books and transferred to said inventory book, which footings were authenticated by the testimony of both of the plaintiffs as correct footings of the inventory contained in the pass-books, and as representing the cost of the goods; and the court of appeals held that the rules of evidence were not violated.

Appeal from an order and a judgment of the general term of the supreme court, affirming an order the special term denying a new trial.

James M. Humphrey, for appellant.

Joel L. Walker, for respondents.

PER CURIAM.—The principal errors alleged relate to the admission in evidence against the objection of the defendant. *First*, of the inventory made in November, 1872, about ten months before the fire, on the sale made by Bennet & Bean to the plaintiff Isaac B. Ellsworth of the stock of goods and fixtures of Bennett & Bean; and *second*, of the footings of the inventory made by Ellsworth & Son, September 10, 1873, a few days before the fire, of the stock then on

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hand. The admissibility of this evidence is to be determined in view of the circumstances. Upon the issues as found, it was incumbent upon the plaintiffs to show the amount and value of the goods burned.

The plaintiffs after the purchase from Bennett & Bean continued the business to the time of the fire, selling from the stock purchased of that firm, and from new stock purchased from time to time, which was mingled with the old stock. The Bennett & Bean inventory was taken by the members of that firm, assisted by the plaintiffs and one Bowie, and was entered in a book, the articles being stated in detail, with the cost price. The sale to Ellsworth was made, upon this inventory, for the net costs, \$7,740.07. The book containing the inventory was delivered to and kept by the plaintiffs in the safe in the store. The inventory of September 10, 1873, was entered in pass-books, the goods being classified, and the cost of each article in each class was given, and footings of the aggregate cost of each class were made. These footings, aggregating \$6,325.25, were transferred by the plaintiffs, and entered in the inventory book containing the Bennett & Bean inventory. The pass books and the bills of purchase were kept in a desk, and were, with other books and papers, destroyed by the fire. The inventory book kept in the safe was not burned. The trial occurred nine years after the fire. The plaintiffs were severally sworn as witnesses in their own behalf, and testified as to the particulars of the loss, so far as they could recall them. It appeared from their testimony that many of the goods purchased of Bennett & Bean, and specified in the inventory of 1872, were in the stock at the time of the fire, and they enumerated a large number of articles bought of Bennett & Bean then on hand; but they were unable to specify the exact quantities, or the exact cost from recollection. The same is true as to the new goods. Under these circumstances the court admitted the Bennett & Bean inventory in evidence as bearing upon the value of the classes

of goods embraced therein, which were in the stock and were burned at the time of the fire, and the court also admitted the footings of the inventory of September 10, 1873, to be read from the Bennett & Bean inventory book. The admission of the Bennett & Bean inventory was not, at the time it was admitted, restricted in terms to the purpose named, but it was so limited in the charge. We think both this inventory and the footings of the second inventory were properly admitted.

The plaintiffs labored under great embarrassment in making out their case owing to the burning of papers and memoranda, and the lapse of time, and seem to have given the best evidence bearing upon the issue at their command. The Bennett & Bean inventory showed what goods were purchased by Ellsworth, and their cost to Bennett & Bean, and also the prices paid by Ellsworth,—matters as to which the plaintiffs had no certain specific recollection. The price paid ten months before the fire for goods burned was some evidence of their value at the time of the fire. The footings of the inventory of September 10, 1873, were authenticated by the testimony of both the plaintiffs as correct footings of the inventory contained in the pass-books, and that they testified that they represented the cost of the goods. It is true that the evidence, as to the quality or value of the goods burned, was not very satisfactory, and the jury, as their verdict indicates, were of this opinion. But we think the rules of evidence were not violated.

There are no other questions requiring special notice.

The order appealed from should be affirmed.

All concur.

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GEORGE SCHENCK, Respondent. v. GEORGE BENGLER *et al*,
Appellants.

Court of Appeals, March 25, 1887.

1. *Appeal. Default. Reinstatement.*—A default, which has been regularly taken in the court of appeals, will not be opened and the case reinstated, where the return, upon which the case would have to be argued, does not contain an exception worthy of a moment's consideration.
2. *Same.*—the question as to the verdict being excessive cannot be reviewed in the court of appeals.

Motion to open a default and restore an appeal.

The affidavit of appellant's attorney is as follows:

"Isaac Kugelman, being duly sworn, says that he is the attorney for the defendants and appellants herein; that this appeal was taken in good faith, but, through the sickness of his child and pressure of professional engagements, he neglected to serve the printed case within the forty days. Deponent further says that he has never received any notice whatever to serve the case, as required by rule 7 of this court before the appeal can be dismissed; that no previous application has been made to vacate the default herein; that deponent is ready to serve said case within forty-eight hours after the default is opened."

The following affidavit was interposed by respondent in opposition to the granting of said motion: "Matthew Marx, of said county, being duly sworn, says that he is the attorney for the respondent in the above-entitled action, and that Isaac Kugelman is the attorney for the appellants; and upon information and belief, and circumstances hereinafter alleged, states that the appeal was not taken in good faith, as the attorney for the appellants has brought this appeal without the knowledge and consent of the parties named as appellants, they having informed the sheriff of Queens county, who went to them to enforce the judgment and collect the execution, that they did not know of the existence of this

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appeal, and had been deceived by their said attorney, and did not desire to appeal. Deponent further says that on the 6th day of January, 1887, the appeal herein was perfected, and that the twenty days having elapsed on the 26th day of January, 1887, and no return was filed by the appellants as by the rule of this court required herein, and that on the 29th day of January, 1887, deponent served the notice required by rule 2 of this court, by handing the same to Isaac Kugelman, Esq., the attorney for the appellants, personally and leaving it with him in the court-house of Kings county, in the city of Brooklyn, requiring him to file the return within ten days thereafter, and that in failing thereof deponent would cause an order to be entered with the clerk of this court dismissing the appeal; and the ten days having also elapsed, and no return having been filed, deponent caused the order of dismissing the appeal to be entered five days after the lapse of the twenty days. Deponent further states that, at the time the forty days had elapsed, in which time the appellants' attorneys were required to serve their printed case, the motion to dismiss the appeal had been filed with the clerk of this court, and on the 17th day of February, 1887, the appeal has been dismissed, and the case was out of the court, and no movement has been made by the appellants' attorney to make and serve a printed case. Deponent further says that the motion to open default by the appellants' attorney had not been made upon this dismissal of the appeal, but on the failure to serve his printed case within forty days, and the said motion, having been irregularly made, should be denied, with costs and disbursements necessarily created on part of the respondent in opposing this matter."

Isaac Kugelman, for motion.

Matthew Marx, opposed.

PER CURIAM—The default herein was regularly taken, and the counsel for defendants asks to have it opened and

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the case restored. We have looked into the return upon which the case would have to be argued in this court. It is very brief, and not an exception in it worthy of a moment's consideration. The question as to the verdict being excessive cannot be reviewed here. Under these circumstances, the motion to open the default should be denied, with ten dollars costs.

All concur.

THOMAS RUTHERFORD, Respondent, v. THE VILLAGE OF
HOLLY, Appellant.

Court of Appeals, April 19, 1887.

Reversing same case, 36 Hun, 638, Mem.

Municipal corporations.—Every change in the natural surface or condition of land, made in the improvement of a street, which to any extent increases the flow of surface water on adjacent premises, does not constitute an actionable injury, and render the municipal corporation liable therefor; but a substantial change in the direction or volume of the surface water, unfavorable to the adjoining owner, must be shown to have resulted from the acts of the corporation.

Action to compel defendant to close a sluice-way, which was claimed to discharge the surface water on an adjoining lot, and thence on plaintiff's lot.

Appeal from an order and judgment of the general term of the supreme court, reversing a judgment entered on report of referee dismissing the complaint, and ordering a new trial before another referee.

John H. White, for appellant.

John Cuneen, for respondent.

ANDREWS, J.—The fact is uncontroverted that the nat-

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ural drainage of the surface water, from the northeasterly side of the hill over which Batavia street was constructed, was through a depression at the foot of the hill, on Batavia street, which extended over the Cary lots and the lot of the plaintiff, from whose lot, prior to 1862, the water was discharged into a gully or watercourse at the northwesterly corner of the plaintiff's tannery. It is also evident that the injury which the plaintiff has sustained to his tannery building, since that date, from the flow of the surface water over his premises, has resulted from the closing up of the outlet by the wall erected by the state, whereby the water was turned from its natural course and thrown against the side of the tannery. But this is not decisive against the right of the plaintiff to maintain the action. It is claimed that the village, by the grading of Batavia street in 1863, and the construction of gutters therein, and of the sluice across Batavia street, has increased and facilitated the collection and discharge of surface water at the lowest point in the street, and that, as a consequence, a greater amount of water than naturally would have collected there has been cast upon the Cary lot, and from there upon the premises of the plaintiff.

The finding of the referee, which is not without evidence to support it, negatives this contention. The referee, in his twentieth finding, in substance finds that the water discharged from the sewer-plate or grate over the sluice on the east side of Batavia street passes onto the plaintiff's premises from the Cary lot, at about the same place that the water has at all times since 1824, when said street was laid out, passed upon the same; that it is the drainage from substantially the same territory, and that, with the same amount of rain fall, "no greater amount or volume of water passes or is discharged onto plaintiff's premises from the sluice (since said Cary's sewer was closed) than did pass or was discharged onto the same at all times since said streets (Batavia and State streets) were laid out.

It is not claimed that the course or amount of surface water which found its way to the foot of the hill before Batavia street was laid out in 1824 was increased by the original construction of the street. The finding, therefore, is equivalent to a finding that the present discharge from the sluice does not exceed the natural drainage, at this point, of the surface water of the adjacent territory. It is insisted, however, that by the construction of the gutter on the north side of Batavia street, and the sluice across the street, the water is made to flow in an artificial channel, and is collected in a body and cast upon the plaintiff's lot. The gutter and sluice were constructed for the protection and improvement of the roadway. It is not improbable that the turnpiking of the street, and the construction of the gutters, diminish to some extent the waste, by soakage and evaporation, and thereby increase somewhat the quantity of water which collects at the sluice, and which is discharged onto the Cary lot, and ultimately on the plaintiff's lot. But it would be quite unreasonable to hold that every change in the natural surface or condition of land, made in the improvement of a street or highway, which to any extent increases the flow of surface water on adjacent premises, constitutes an actionable injury.

The case of *Noonan v. City of Albany* (79 N. Y. 470) and cases of kindred character, establish no such unreasonable and inconvenient doctrine. But it is said that the water, by the acts of the defendant, is thrown upon the plaintiff's lot in a body, whereas before it was dispersed over the surface, and was absorbed, doing comparatively little injury. But there is no finding that the manner of discharge has been materially changed by the acts of the defendant, and such a finding would have been in conflict with some of the evidence, although it might have been warranted by other evidence. It is true that it is found that the water passes onto the plaintiff's lot from the Cary lot substantially in a body. But this finding is made in connection with another

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finding, that the water now passes over the surface of the Cary lot at the lowest point, before reaching the plaintiff's lot. The defendant is not responsible for the manner in which the water flows over the plaintiff's lot, unless it is attributable to some act of the defendant. This question was controverted on the trial.

The Cary sewer which connected with the sluice, was closed in 1879. It is found that since that time no water has passed through it, and the water which now reaches the plaintiff's lot first passes through the sluice across the road to the east side thereof, where it is interrupted by the wall or face of the closed Carey sewer, and escapes by "welling up" through the sewer plate or grate, and thence passes over the surface of the Cary lot, and onto the lot of the plaintiff. The construction of the sluice probably facilitates the passage of the water from the roadway, but it was not shown, or at least it was not shown by uncontradicted evidence, that the construction of the sluice, or the manner in which the water was discharged from it, affected materially the flow across the plaintiff's lot, from what it originally was before the sluice was constructed. It is claimed that the excavations in the street and adjacent lots, made by the state in 1862, for canal purposes changed to some extent the direction of the drainage, and that the village had no right afterwards, by turnpiking the street, to alter, to the prejudice of the plaintiff's lot, the surface of this "new earth" created by the canal authorities, and that, in determining the rights of the parties, this new condition must be regarded in the same way as though it was the original and natural condition of the land. It is a sufficient answer to this claim that there is no satisfactory evidence that the act of the defendant, in restoring the highway, made any substantial change in the direction or volume of the surface water, unfavorable to the plaintiff. But at all events we are of opinion that if the defendant, in improving the highway, did not increase the flow of surface water

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on the plaintiff's lot beyond what it was prior to the excavation, they committed no wrong to the plaintiff.

Our conclusion, after a careful examination of the case, is adverse to the general term. The general term reversed the judgment of the referee, on the ground that the facts found by him showed an actionable injury, within the case of Noonan v. City of Albany, *supra*. We differ with the general term, on the merits, simply as to the construction of the findings of fact by the referee, which are numerous and complicated.

We think there are no valid exceptions to evidence. The order of the general term should therefore be reversed, and the judgment on the report of the referee affirmed.

All concur.

JAMES P. CONNER *et al.*, Executors, etc., Appellants, v.
MARTIN J. KEESE *et al.*, Respondents.

Court of Appeals, April 19, 1887.

Reported below, 39 Hun, 658.

Pleadings. Admission.—A defendant, who admits a material allegation of the complaint by his answer, and seeks to avoid it by averments of new matter, has the affirmative of the issue, and, to sustain his defense, must prove such new matter; and if he fails to do so, the averment of the complaint stands admitted.

Appeal from judgment of general term of the supreme court.

Henry Thompson, for appellants.

George W. Stephens, for respondents.

RAPALLO, J.—This action was brought by William C. Conner, sheriff of the county of New York, in his lifetime,

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against one of his deputies, and the sureties of such deputy on his official bond given to the sheriff. The sheriff having died, the action has been continued in the name of his executors. The condition of the bond was such as, among other things, to render the sureties of the deputy liable for any damage the sheriff should sustain by reason of any false return which the deputy might make to any process delivered to him for execution. The breach alleged was, in substance, that an execution in an action of replevin for the return of the replevied chattels to the defendant was issued to the sheriff, and by him delivered to his deputy, Keese, for enforcement, and that the deputy made a false return to said execution that the chattels could not be found, by reason of which false return judgment had been recovered against the sheriff, which he had paid, with costs, etc. On the trial the plaintiffs proved the issuing of the execution. Its delivery to the deputy, Keese, was admitted. The return that the chattels could not be found, etc., signed with the name of the sheriff, and the recovery of judgment against the sheriff for the falsity of this return, were also proved. For the purpose of binding the deputy and his sureties by this judgment, it was shown that he was a witness on the trial of the action against the sheriff for the false return, and also that, by the express terms of the bond, they waived notice of any action brought against the sheriff for any misfeasance or nonfeasance on the part of the deputy, and covenanted that a recovery against the sheriff in any such action should be conclusive evidence of their liability for the full amount recovered. There remained but one link to be supplied in the chain of facts necessary to establish the liability of the defendants. That was that the return, for the falsity of which the sheriff had been compelled to pay damages and costs, had been made by the deputy, or on his report to the sheriff or under-sheriff. That essential fact was not established by the evidence adduced on the trial of this action, and on that ground the plaintiffs were nonsuited.

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As to the defendant Johnstone the nonsuit was clearly right; for, by his answer, he put in issue all the facts alleged in the complaint bearing upon that question. The opinions of the majority of the general term are clearly right, so far as that defendant is concerned. But as to the defendants Campbell and Keese, the case is different. By their answers they expressly admitted that the return was made by the deputy Keese. The complaint alleges that Keese made the return, and that it was false, by reason whereof the sheriff was made liable. The answer of defendant Campbell, after admitting the formal allegations of the complaint, setting forth that the plaintiff was sheriff, that he appointed Keese, one of his deputies, the execution of the bond sued upon, and the waiver of notice therein contained, denied the other allegations of the complaint only so far as not thereafter specifically admitted, qualified or denied, and then proceeded to aver that the deputy Keese was willing and desirous faithfully to execute the process confided to him for execution, but that a third party claimed title to the property, and was in possession thereof, and that he made the return for which the sheriff was sued, under instructions from the under-sheriff to consult the counsel of the sheriff, and to follow their advice in respect to levying upon the property; that such counsel having advised him not to execute the writ, but to make return that he could not find the property, he did make such return, contrary to his own judgment, but under the express direction of the sheriff through his counsel. The answer of the defendant Keese was to the same effect, though less particular in detail.

Of course, if the matters thus set up in defense had been proved, they would have afforded a complete justification for the action of the deputy, and would have absolved him and his sureties from any charge of misconduct which could have rendered them liable upon the bond. But no such proof was given or offered, and the defendants on the trial

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of this action rested their defense solely and singly upon the point that it had not been proved that the deputy made the return which was found to have been false, and on that sole ground the general term sustained the nonsuit. We do not think that, as to the defendants Campbell and Keese, that fact was in issue, and that the counsel for the appellants is right in his contention that it was admitted by the pleadings. The answers of those defendants were in confession and avoidance, as would have been said of a like pleading under the common law system, and should be held now, so far as the substance is concerned. They admitted that the deputy made the return which rendered the sheriff liable, but set up as a justification that they did so pursuant to the direction of the sheriff himself, through his authorized agents. The affirmative of that issue was with them, and to sustain their defense it was necessary that they should prove their allegation. If they failed to do so, the averment of the complaint stood admitted. The case is devoid of any evidence throwing light upon the merits of the case, and we must decide it on the record.

The judgment should be affirmed, with costs as to the defendant Johnstone, and reversed as to the defendants Campbell and Keese, and a new trial ordered as to them with costs to abide the event.

All concur.

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CHRISTOPHER SCHWINGER, Respondent, v. ALONZO B.
RAYMOND, Appellant.

Court of Appeals, April 19, 1887.

Affirming same case, 35 Hun, 666, Mem.

1. *Appeal. Order denying new trial.*—The general terms has the power to set aside a verdict as contrary to the evidence without any exception, but the court of appeals can consider no objection which is not based upon some exception taken at the trial. An appeal to the latter court from an order denying a motion for a new trial brings up only questions of law based upon exceptions taken in the trial court.
2. *Evidence. Expert.*—Whether barrels upon the deck of a canal boat were properly covered by the captain so as to protect them from rain, is not properly a subject of expert evidence. From the facts proved, the jury can determine whether the covering was sufficient.
3. *Charge. Exception.*—The reply of the court to a request to charge, "it is unnecessary, I think, as my charge covers it," is a clear intimation to the jury that the request is proper; and, in case the charge does substantially cover it, an exception to such response of the court will not lie.

Appeal from a judgment of the general term of the supreme court.

D. C. Hyde, for appellant.

Geo. M. Osgoodby, for respondent.

EARL, J.—This action was brought by the plaintiff to recover his freight for transportation of 200 barrels of beans on a canal-boat from Albion and Brockport to New York city. The defendants allege, by way of counterclaim, that the beans were transported in such a careless and negligent manner that they became wet, and in consequence there-

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of sprouted, and were greatly damaged. Upon the trial the plaintiff gave evidence tending to show that the contract was to carry the beans on the deck of his boat, and that he was not to be responsible for any damage to them from moisture, but that he was to furnish lumber sufficient to cover them, and that the defendants were to cover them with the lumber thus furnished. The plaintiff claimed, and gave some evidence tending to show, that he furnished the lumber in pursuance of this agreement. On the part of the defendants, they gave evidence tending to show that there was no agreement that the plaintiff should be exempt from any responsibility as carrier; that he was to furnish lumber to cover the beans; and that they were to give directions to the captain of the boat as to covering them with the lumber; that the plaintiff failed to furnish lumber for that purpose; and that the boat entered upon its voyage without any covering upon the beans, and that in consequence thereof they became wet, and were greatly damaged. As to what the contract really was between the parties there was a fair conflict in the evidence, but there was a great preponderance of evidence that the plaintiff did not furnish lumber to cover the beans, and that he failed in that respect to keep his contract. There was no motion, however, to nonsuit the plaintiff at the trial, or for the direction of a verdict, and no exception which brings to us the question whether there was sufficient evidence to sustain the verdict of the jury. The court below had the power to set aside the verdict as contrary to the evidence without any exception, but in this court we can consider no objection which is not based upon some exception taken at the trial; and the appeal to this court from the order denying defendants' motion for a new trial brings here only questions of law based upon exceptions taken at the trial. Therefore, however unjust this verdict may be upon the facts appearing in the case, we are powerless, on that account, to give the defendants any relief.

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The record contains but one exception taken by the defendant during the progress of the trial before the submission of the case to the jury. While one of the defendants was testifying as a witness, he stated that he had heard the testimony of the captain of the boat as to the manner in which he covered the beans; that he was acquainted with the manner of covering deck-loads, and had been for fifteen or twenty years; that he had been a shipper on the canal for sixteen or eighteen years; and that the defendants' warehouse was on the canal. He was then asked this question: "What is a proper and proof way of covering deck-loads?" To this there was objection on the part of the plaintiff, and then this question was asked: "I will ask if loose boards or barrels tiered in the manner mentioned by the witness Jacobs, loosely lapping one on the other in that way, lengthwise with the boat, if that will protect deck freight from rain?" To this plaintiff's counsel objected, and the objection was sustained, and defendants' counsel excepted. We think the question was properly excluded. Whether the barrels were properly covered by the captain so as to protect them from rain was not properly a subject of expert evidence. The facts were proved, and from them the jury were to determine whether the covering was sufficient. It was not difficult to place all the facts before the jury, and from them they must be supposed to have had sufficient skill and knowledge, dealing with elements with which all men are adequately informed, to determine whether the barrels were properly covered for protection against rain.

The only other exception which requires any notice whatever, is that taken to the refusal of the judge to charge as requested by the defendants, as follows: "If they find from the evidence that it was a part of the contract of affreightment that defendants should perform or help perform the labor of covering the goods with lumber to be furnished by the plaintiff, and that he would not be responsible for the manner in which such labor would be done, nor

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for protection of the goods by such cover from the elements, and did furnish the lumber, yet that the defendants were entitled to a reasonable opportunity for performance after the production of the lumber, and the proper arrangement of the goods on the deck to receive the cover, and if the captain departed with the goods from Albion or Brockport without a proper cover, or the defendants consent that they might go uncovered, and without giving the defendants such opportunity, the plaintiff waived performance by defendants in that respect, and was bound to care for the goods as though no special contract had been made." In reply to this request the court said: "It is unnecessary, I think as my charge covers it." This was a clear intimation to the jury that the request was proper, and we think the charge did substantially cover it. The court had charged the jury as follows: "If you find that the property should be carried upon the deck, and further, the agreement was that the plaintiff should furnish the lumber, and the defendants should themselves place the lumber on the beams, and cover them, then, if the captain furnished the lumber, and they omitted to use it, and cover the beams, when they had an opportunity, then they cannot recover; and that involves the proposition that the captain did furnish lumber either at Albion or Brockport, for it was not contemplated that the defendants should at any other place adjust the lumber. If you find it was the agreement that the plaintiff was to furnish, and that the defendants were to advise the captain how to use it, and cover and protect the property, and the lumber was furnished, and they gave instructions to the captain, then they did all their duty, and the plaintiff was liable to them for the damages which might have occurred, the plaintiff himself assuming the risk that he would protect and preserve the property; and, if he didn't furnish the lumber at all, then they were under no obligation to adjust it."

It may, however, be said that there was really no con-

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troversy at the trial that the defendants had opportunity to cover the beans, provided the lumber was furnished by the plaintiff. The contention of the plaintiff was that he furnished the lumber; and that of the defendants was that no lumber was furnished, although they repeatedly requested that it should be. And therefore they are not in a position to contend that they had no opportunity to use the lumber.

The principles controlling this case were in the main settled when it was here before (83 N. Y. 192), and nothing further needs to be written now.

The judgment should be affirmed with costs.

All concur.

ERNEST LUDWIG, Respondent, v. LOUIS C. GILLESPIE,
Appellant.

Court of Appeals, April 19, 1887.

Affirming same case, 51 N. Y. Super. 310.

Principal and agent. Undisclosed.—When a contract not under seal is made with an agent in his own name, for an undisclosed principal, whether he describes himself to be an agent or not, the agent may sue upon it.

See note at end of case.

Appeal from a judgment of the general term of the New York superior court, affirming a judgment for plaintiff.

Wm. Hildreth Field, for appellant.

M. W. Divine, for respondent.

DANFORTH, J.—The action was to recover \$22,251.60, as the price of certain bitumen theretofore sold and delivered by the plaintiff to the defendant. Besides a general denial, the answer set up that the bitumen was sold and delivered

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by the plaintiff, not on his own account, "but as known agent for the firm of Arles, Dufour & Co., his disclosed principals, under a special contract in writing, and without authority to receive the proceeds of such sales;" and upon this defense the defendant, upon trial of the issues before a referee, asked a dismissal of the complaint. His request was denied, and judgment went against him, both upon the report of the referee and at the general term.

The principal point made in his behalf upon this appeal is that the action was improperly brought by the plaintiff in his own name. It appeared that the contract was negotiated by one Clarke, a broker, who in that character made and signed a writing which, so far as is material, was in these words: "New York, April 25, 1882. Sold for account of Mr. E. Ludwig, agent, to Mr. L. C. Gillespie, four thousand (4,000) cases Syrian bitumen," etc. A time for delivery was specified, and the price declared "payable thirty days from each delivery." This contract was assented to by both parties, and the referee finds that "there was no proof that the name of Arles, Dufour & Co. was disclosed or mentioned as the principal of the plaintiff in the negotiations for the sale, nor at any time before this contract had been executed and delivered;" but he also finds that, at the time of making it, the "plaintiff was in fact the agent of Arles, Dufour & Co. of Marseilles, France, for the sale of imported goods," and that the bitumen was sold and delivered by him, not on his own account, but for and on account of Arles, Dufour & Co., and as their agent.

The evidence sustains these findings, and the case is thus brought within the well-established rule of law, that when a contract not under seal is made with an agent in his own name, for an undisclosed principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon it. *Considerant v. Brisbane*, 22 N. Y. 389; *Schaefer v. Henkel*, 75 id. 378. The defendant has received

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the thing bargained for, and a recovery by the plaintiff and payment of the judgment will be a complete protection to the defendant against any claim of the principal arising upon the contract.

The other questions presented by the appellant relate to rulings by the referee upon offers of evidence, and were properly held by the general term to be without merit.

The judgment should be affirmed.

All concur.

NOTE ON THE RELATION AND LIABILITY OF PARTIES IN CASE OF AN UNDISCLOSED AGENCY.

An agent who discloses fully the name of his principal at the time of making the contract, is not usually liable to the other contracting party for the purchase price of the goods sold and delivered, unless made so by a special pledge of his own credit. But where for any reason he fails at such time to make known the name of his principal, he renders himself liable. This liability is not confined to any particular class of agents, but extends to an auctioneer, broker, commission merchant, agent for a corporation, a copartner, agent for a foreign principal, a public agent, and in fact for every kind of agency.

Where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, whether he describes himself as an agent or not, either the agent or principal may sue upon it.

It is not sufficient to exonerate an agent from liability merely because he stated that he was acting as an agent. Nor will it exempt a commission merchant from responsibility, on the ground that he was acting as the agent for some other person, by merely showing that he was generally known to the contracting party and others to be a commission merchant.

It is not enough that the other party has the means of ascertaining the name of the principal; he must have actual knowledge, in order to relieve the agent from personal liability. The disclosure of his agency is not completely made, unless it embraces the name of the principal.

Where the name of the principal is disclosed after the sale, so as to give a right of action in favor of the vendor against him for the price of the goods sold, the principal may, on his part, maintain an action against the vendor, for a breach of warranty in the contract of sale.

Where the purchaser or vendor is not known to the other party to be principal, and credit was at the time given to the agent, who was in fact an undisclosed agent, such party can, at his election, hold for payment either the agent or his principal. Though he may elect which of them he will hold responsible, he cannot have a recovery against both of them. But

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the commencement of an action against either the agent or the principal is not conclusive of an election to hold him only liable. A judgment against either of them, even without satisfaction, will constitute a conclusive election, but no legal proceeding short of judgment will have such an effect. The party, by a joint action against the principal and agent, does not elect to accept either as his sole debtor.

In the cases relating to the right of set-off in behalf of a person who has dealt with an agent, whose agency was unknown to such person, the question arises between the principal and the party dealing with the agent; and the right of the party purchasing property of the agent, in such cases to set-off a claim against the latter, in an action brought by the principal, depends upon the want of actual knowledge not only of the agency, but also of circumstances which would direct a prudent man to inquiry and information of the fact, or furnish him reason to believe that he was dealing with an agent. Distinctions are drawn in the application of this principle, between cases in which the supposed principal was a factor having the possession of the goods, and in those in which he was a mere broker, negotiating without such possession. Anything short of such agency, as vests in the agent the actual possession and apparent control of the property, will be insufficient to give such right to the purchaser as against the principal.

Where the sale is made to the agent and the credit given to him without knowledge that he is purchasing for a principal, the vendor cannot recover of the principal for such goods, when the principal has, prior to the transaction, furnished the agent with the money with which to make the purchase. But the rule is different, where the agent, at the time of making the purchase, disclosed the fact that he was purchasing for a principal; or, where the agent was authorized by the principal to purchase upon credit, and the money was furnished to the agent, after the disclosure of such agency; and even in the latter case, the seller may preclude himself from charging the principal, by lying by and suffering him to settle, in good faith, with the agent for the purchase.

What agents. Auctioneer.—An auctioneer who sells goods as the mere agent of others, and does not at the time of the sale disclose the names of his principals, renders himself personally liable as the vendor of the goods. *Mills v. Hunt*, 17 Wend. 332.

For foreign principal.—In *Taintor v. Prendergast*, 8 Hill, 72, it was held that whether the principal is or is not a foreigner, his agent, omitting to disclose his name, would be personally liable to an action. But even a foreign principal, when discovered, would be liable for the price of the commodity purchased by his agent, unless there was an intent to give an exclusive credit to the agent. Where the purchaser is known to live in a foreign country, such intent may be inferred from the custom of trade; and even where the parties reside in different states under the same general government, such custom has been held sufficient to exonerate the prin-

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cipal. The usual and decisive indication of an exclusive credit is, that the creditor, though he knows that there is a foreign principal, makes his charge in account against the agent. But if the seller is kept in ignorance that he is selling to an agent or factor, he has a concurrent remedy against both the agent and principal.

Where an agent acquires rights in the course of dealing for his principal, whether the latter is foreign or domestic, and his name is kept secret, the principal may sue to enforce those rights. And the defendant is not by such form of action to be cut off from any equities he may have against the agent. The latter is considered as the exclusive principal so far, but no farther. As a general rule, the latter cannot maintain an action in his own name at all; though an exception may be found to arise in case where he has the rights of bailee or some other rights, not the mere powers of a naked agent.

Public agent.—When an agency is disclosed, and the contract relates to the matter of the agency, and is within the authority conferred, the agent will not be personally bound, unless upon clear and explicit evidence of an intention to substitute, or to superadd, his personal liability for, or to, that of the principal. *Hall v. Lauderdale*, 46 N. Y., 70.

In case of a public agent, much stronger evidence is required, to rebut the presumption, that the parties do not contemplate the personal liability of the agent, than when the contract and agency are of a private nature. *Id.* 2 Kent, 632; *Walker v. Swartout*, 12 John. 444; *Olney v. Wickes*, 18 *Id.* 122; *Osborne v. Kerr*, 12 Wend. 179.

Agent for corporations.—An agent of a manufacturing establishment bought a quantity of dye-stuffs for the use of the factory, without disclosing the name of his principal. The bill of goods was made out to him as agent, and he drew a bill of exchange on a third person signing it in his name as agent. The bill was subsequently protested, and an action to recover the price of the goods was brought against the principal. It was held that the principal could not be charged as drawer of the bill, as his name did not appear on it; but that the plaintiff was entitled to recover under account for goods sold in case the facts were sufficient to warrant the jury in saying that the goods were not sold on the exclusive credit of the agent.

In *Inglehart v. Thousand Island Hotel Co.*, 7 Hun, 547, the hotel was erected and carried on by two parties who were the president and secretary of the defendant company, and they and others were its trustees and stockholders. They were ostensibly managing and controlling the said hotel and its affairs and purchased goods of the plaintiff. And the question was whether they were acting individually or on behalf of the defendant in such purchase. And it was held that, if they, as officers or agents of the defendant, were carrying on said hotel, the defendant was clearly liable for debts contracted by them for such purpose, even though such debts were nominally contracted in their own names. If goods are purchased by

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an agent in his own name, the creditor may, nevertheless, hold the principal for the debt, when discovered. *Id.*; *Beebe v. Robert*, 12 Wend. 413; *Ferguson v. Hamilton*, 35 Barb. 427; *Porter v. Tallcot*, 1 Cow, 359; *Tainter v. Pendergast*, *ante*.

Broker, etc.—In *Knapp v. Simon*, 96 N. Y. 284, it was held that, when a broker purchases or sells property without disclosing to the respective principals in the transaction the name of the party for whom he acts, he becomes, on the one side, liable personally for the purchase price of the property bought, and, on the other, is entitled to collect such price from the principal at whose instance the purchase was made. The vendee in such case can relieve himself from liability to the broker only by showing payment of the contract price by him to the original vendor, or a release for a good or valuable consideration from the broker.

In *Ludwig v. Gillespie*, 105 N. Y. 653, a contract was negotiated by a broker, who in that character made and signed a writing which, so far as is material, was in these words: "New York, April 25, 1882,—sold for account of Mr. E. Ludwig, Agt., to Mr. L. C. Gillespie, four thousand (4,000) cases Syrian Bitumen," etc. The name of the principal was not disclosed or mentioned in the negotiations for the sale, nor at any time before this contract was executed and delivered; but the bitumen was sold and delivered by the seller, not on his own account, but on account, and as the agent of a certain principal. And it was held that, where a contract, not under seal, is made with an agent in his own name for an undisclosed principal, whether he describes himself to be an agent or not, either the agent or principal may sue upon it. See *Considerant v. Brisbane*, *ante*; *Schaefer v. Henkel*, *ante*.

The defendant has received the thing bargained for, and a recovery by the agent and payment of the judgment will be a complete protection to the purchaser against any claim of the principal arising upon the contract.

In *Jemison v. Citizens' Sav. Bk.*, 44 Hun, 412, an action was brought by the plaintiffs, who were commission merchants and cotton brokers, to recover a balance of money, claimed to have been expended by them in the purchase and sale of cotton futures for the defendant, and for their commissions. The purchases and sales were made by the plaintiffs under the direction of the defendant's cashier, who informed the plaintiffs that neither himself nor the bank dealt in futures, and that, in case he ordered purchases, it would only be for good responsible customers who had put up the necessary margin; but he did not disclose the defendant's principals at the time of giving the orders. And it was held that the defendant was not exonerated from responsibility merely because it stated that it was acting as an agent.

In *Warring v. Mason*, 18 Wend. 427, the defendants were commission merchants in the sale of cotton, and made a sale by sample of a number of bales of cotton to plaintiffs. At the time of the sale, nothing was said as to who were the real owners of the cotton. Both parties resided in

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New York, and it was well known among merchants there that the defendants dealt in cotton as commission merchants; but there was no proof that the plaintiffs knew that the defendants dealt in cotton on consignment only. And it was held that there was nothing in the case to exempt the defendants from liability, on the ground that they were acting merely as commission merchants, or as agents for some other person. As the cotton was sold in their names, merely proving that they were generally known to the plaintiffs and others to be commission merchants, amounted to nothing, without also proving that commission merchants never buy or sell on their own account. If they wished to protect themselves from responsibility as agents, they should not have sold in their own names; or, at least, they should have disclosed the name of their principal, if the cotton was not in fact theirs, so as to give the purchasers an action against him.

In *Beebe v. Robert*, *ante*, it was held that, where the purchaser is disclosed at the time of the purchase, it then becomes a question of fact, to be determined from all the circumstances in the case, whether the vendor relied exclusively upon the credit of the agent or not; and if he did, he cannot afterwards resort to the principal.

But when goods are bought by a broker or other agent, and he does not disclose his principal at the time, the principal, when discovered, is liable on the contracts which his agent has made for him. *Id.* And where the name of the principal is disclosed after the sale, so as to give an action in favor of the vendor against him for the price of the goods sold, the principal may, on his part, maintain an action against the vendor, for a violation of his part of the agreement; as, for instance, a breach of warranty. *Id.* In such case, it would seem to follow that there is sufficient privity of contract between them to enable the principal to maintain such an action against the vendor. The general rule is, that the action should be brought in the name of the party whose legal interest has been affected, against the party who committed the injury.

A broker, though acting for another, makes himself personally liable if he contracts in his own name, without disclosing the name of his principal. This will be so, though the seller supposes at the time that he is acting as a broker or agent for another; the subsequent disclosure of the principal, and the commencement of an action against him by the seller, will not discharge the broker from personal liability. *Cobb v. Knapp*, 71 N. Y. 348.

It is not sufficient that the seller may have the means of ascertaining the name of the principal; he must have actual knowledge. There is no hardship in this rule of liability against agents. They always have it in their own power to relieve themselves, and when they do not do so, it must be presumed that they intend to be liable. *Id.*

Election.—In this case, an action was brought to recover for wheat alleged to have been sold by plaintiff to defendant, but which was in fact

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purchased by the latter for third persons. The principal was not disclosed. The defendant expressly purchased on his own credit, directed the goods to be charged to him and stated that the wheat was for the "Blissville Distillery," and was to be delivered there. Plaintiff did not know the proprietors of the distillery.

Subsequently, the defendant disclosed the name of his principal. And it was held that a subsequent disclosure of the principal's name by the agent and the commencement of an action against him by the seller were not conclusive of an election to hold him only responsible; and that the fact of commencing such action, and the statements made in the complaint therein, were proper to be considered by the jury on the question of knowledge as to the principal, but did not operate as a legal discharge.

In the case of *Beymer v. Bonsall*, 79 Penn. 298, it was held that neither the agent nor principal in such a case would be discharged short of satisfaction.

Where purchasers are known to be the principals and the party actually making the purchase is only their agent, the former are alone responsible, unless credit was given exclusively to the agent, in which event the agent alone is liable. *Meeker v. Claghorn*, 44 N. Y. 349. But if the purchasers were not known to be the principals, and credit was at the time given to the agent, who was in fact an undisclosed agent, the vendors can hold for payment, at their election, either the agent or the principals. *Id.* If the party personally purchasing was not in fact the agent of the alleged purchasers, but furnished the articles to them upon his agreement with them, the latter are not responsible to the vendors. *Id.*; *Pentz v. Stanton*, 10 Wend. 271.

Where the agent purchases property and promises payment without disclosing his agency, he is originally liable. *Mattlage v. Poole*, 15 Hun, 556. The right of recovery exists against the principal when discovered; but the vendor, though he may elect which of them he will hold responsible, cannot have a recovery against both the agent and the principal. *Meeker v. Claghorn, ante*; *Mattlage v. Poole, ante*.

The vendor has an undoubted option as to which he will hold liable in such case, as both principal and agent are equally responsible to him. By proceeding to a judgment against the principal, he makes an election and will be held concluded thereby. But a proceeding at law on the claim, short of judgment, will not be conclusive of an election. While the judgment against either principal or agent, even without satisfaction, will constitute a conclusive election, no legal proceeding prior to a judgment will have that effect. In *Nason v. Cockroft*, 3 Duer, 368, it was held that the mere commencement of a suit against the principal will not discharge the agent. In *Beymer v. Bonsall, ante*, it was said that the agent being already liable on his contract, can be discharged only by satisfaction of it by himself or another. This remark was, perhaps, too strong.

In *Mattlage v. Poole, ante*, the vendor brought an action against both

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the agent and the principal, and it was held that he may discontinue against the principal and continue the action against the agent. By proceeding in an action against principal and agent jointly, the vendor has not elected to accept either as his sole debtor; for if the commencement of the action discharged one, it would in like manner discharge the other debtor also.

An agent contracting in his own name, and failing to disclose the name of his principal at the time of making a contract for the sale or purchase of goods, is personally liable for whatever obligation may arise out of the contract. *Argersinger v. Macnaughton*, 114 N. Y. 535; *Mills v. Hunt*, *ante*; *Morrison v. Currie*, 4 Duer, 79; *Cobb v. Knapp*, *ante*; *Ludwig v. Gillespie*, *ante*; *Jemison v. Citizens' Sav. Bk.*, *ante*.

Where an agent makes the contract of sale in his own name, as commission merchant, without disclosing the name of any principal, his warranty given to produce the sale may, within the above rule, be deemed, as between the parties, his undertaking. In such case, the purchaser relies upon the responsibility of the person with whom he deals for the performance of the contract, and does not look elsewhere to obtain it. When there is, in fact, a principal, the agent may ordinarily relieve himself from personal liability, upon a contract made in the principal's behalf, by disclosing his name at the time of making it. *Id.*

Upon such disclosure, the party proceeding to deal with the agent may or may not, as he pleases, enter into contract upon the responsibility of the named principal; but to permit an agent to turn over to his customer an undisclosed and, to the latter, unknown principal, may have the effect to deny to the customer the benefit of any available or responsible means of remedy or relief founded upon the contract.

The rule is no less salutary than reasonable that an agent may be treated as the party to the contract made by him in his own name, unless he advises the other party to the contract of the name of the principal whom he assumes to represent in making it, where that is unknown to such party. *Id.*

This proposition is not inconsistent with the general rule that an agent, acting within the scope of his authority with a party advised of his agency, will not be personally charged, unless it appears that such was his intention. *Id.*; *Hall v. Lauderdale*, 46 N. Y. 70.

The disclosure of his agency is not completely made, unless it embraces the name of the principal. Without this, the party dealing with him may understand that he intends to give his personal liability and responsibility in support of the contract and for its performance. *Argersinger v. Macnaughton*, *ante*.

A party who would excuse himself from responsibility, on the ground that he acted as the agent of another, ought to show that he communicated to the other party his situation as an agent, and that he acted in that capacity, so as to give a remedy over against his principals. *Mauri v. Hefernan*, 13 John, 58.

Set-off.—The cases, which have relation to the right of set-off in behalf

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of a person who has dealt with an agent, whose agency was unknown to such person, have no necessary application to the question here discussed. In those cases, the question arose between the principal and the party dealing with the agent, without any knowledge of his agency, and upon the faith that he was dealing on his own account in selling property in his possession and of which he was apparently the owner. *Argersinger v. Macnaughton, ante*. And in such cases, the right of the party, purchasing property of the agent, to set off a claim against the latter, in an action brought by the principal, is dependent upon the want of actual knowledge, not only of the agency, but also of circumstances which would direct a prudent man to inquiry and information of the fact, or furnish him reason to believe that he was dealing with an agent. *Id. Wright v. Cabot, 89 N. Y. 570; Nichols v. Martin, 35 Hun, 168.*

Third persons may deal with one as principal who holds himself out as such, conceals his agency and does not disclose its origin. In such case, the real principal cannot so assert his rights as to cut off the equities which have grown up between such agent and third persons. *Wright v. Cabot, ante*. This rule has its source and its justification in the broader doctrine that, where one of two innocent parties must suffer, he shall bear the loss whose act made its occurrence possible.

But neither the rule nor its reason apply where the third person knows, or has sufficient information to fairly infer, the existence of an actual agency, though the name of the principal is not disclosed. *Id. Hogan v. Shorb, 24 Wend. 462; Maanss v. Henderson, 1 East. 335; Bliss v. Bliss, 7 Bosw. 345.* And the same result follows where, without actual knowledge of the agency, the circumstances are such as fairly to put the third person on inquiry. *Wright v. Cabot, ante*.

Most of the cases above cited are those in which the third person was a purchaser; but distinctions are drawn between cases in which the supposed principal was a factor, having possession of the goods, and those in which he was a mere broker, negotiating without such possession. *Id.*

In this case, an action was brought to recover the proceeds of the sale of a quantity of "Esparto grass" belonging to plaintiffs, which was consigned by them to a firm for sale on their account. This firm employed defendants who were brokers to make a sale. This the defendants did with knowledge that the firm were not the owners of the goods, or under circumstances sufficient to put them upon inquiry. And it was held that an application of a portion of the proceeds of the sale by the brokers in payment of a prior indebtedness of the consignees to them, was unauthorized, and that the owners were entitled to recover the same.

In *Nichols v. Martin, ante*, a party sold and delivered a quantity of wheat and received in payment therefor the purchaser's promissory note for the price thereof, payable to his order in sixty days. Before the maturity of the note, the vendor purchased for five dollars an overdue note made by the seller for an amount in excess of the amount of the purchaser's note. The purchaser refused to pay his note upon its maturity,

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and, though he was then informed by the seller that the wheat belonged to his wife and had been sold by him as her agent, insisted upon his right to have the amount thereof set off against the note held by him.

The sale of the wheat by the owner's husband, without disclosing any relation to the property other than that which was implied from the transaction of the sale, and without any knowledge on the purchaser's part that he was not the owner or had any principal for whom he was acting, gave the owner the right to treat him as the principal in the transaction, and entitled him to the allowance of the set-off as claimed. When a person has actual possession of personal property, and the apparent control and management of it, and deals with it and makes sales of it, apparently as principal, when in fact he is agent of another, the purchaser from him may treat him as the owner, and, in an action brought by the principal for the price may set off a claim he has against the agent, provided the purchaser in good faith supposed the agent was owner, and there were no circumstances which could put him upon inquiry or charge him with negligence in not suspecting or ascertaining that the seller was agent and not the owner of the property; *Id.*; *Hogan v. Shorb, ante*; *Judson v. Stillwell*, 26 How. 513; *Pratt v. Collins*, 20 Hun, 126.

This rule is particularly applicable to factors. They have the unqualified possession of property and a lien for advances, and may maintain actions in their own name; but, in view of the principles upon which the remedy and protection of the purchaser rest, it also embraces in its operation all agents whose possession of, and apparent relation to, the property, come within such prescribed rule of law. *Nichols v. Martin, ante*. Anything short of such agency, as vests in the agent the actual possession and apparent control of the property, will not give such right to the purchaser as against the principal. Such right is founded in part upon the opportunity which the owner, by his authority has given his agent to so deceive and mislead those with whom he deals. *Id.*

But the exercise of actual possession, control and management by the agent, which does not come within the power given by the principal, does not afford to the purchaser such relief against the principal, though the agent has the power to sell and does sell without declaring any principal, but apparently as owner. For this reason, a purchase made of a broker gives no such right to the purchaser against the principal. *Bliss v. Bliss*, 7 Bosw. 339; *White v. Jaudon*, 9 Id. 415; *Dunn v. Wright*, 51 Barb. 244. This class of agency is to make sales without ordinarily having in the agent the actual custody and possession of property, though he sells property and causes the delivery of it to be made to the purchaser.

But to enable the purchaser in any case to charge the principal with a debt due from the agent, by way of set-off against the purchase price, he must be free from negligence in ascertaining, at the time of the purchase, the relation of the agent to the property. *Nichols v. Martin, ante*. It is sufficient to defeat him as against the principal, if he then had knowledge or

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information of any circumstances which should have induced inquiry in respect to the ownership of the property, *Id.* *Wright v. Cabot, ante*; *Brown v. Robinson*, 2 Caine's Cases, 341.

Money furnished to agent.—The vendor cannot recover of the principal for goods sold to an agent, when the sale is made to the agent and the credit given to him without knowledge that he is purchasing for a principal, when the principal has already furnished the agent with the money with which to make the purchase. *Laing v. Butler*, 37 Hun, 144. But the rule is different where the agent, at the time of making the purchase, disclosed the fact that he was purchasing for a principal, or where the agent was authorized by the principal to purchase upon credit, and payment was made to the agent after the disclosure of such agency. If the agent buys in his own name, but for the benefit of his principal and without disclosing his name, the principal is also bound as well as the agent, provided the goods come to his use, or the agent acted in the business entrusted to him according to his power. *Id.* In the rule as stated, it will be observed that the principal is held, provided the agent acted in the business entrusted to him according to his power. In the case of a general agent, where the agency is disclosed, the person dealing with him has the right to assume that he acts, within the general scope of the business entrusted to him, or authorized by his principal, and the dealer has the right to rely upon such assumption. *Id.*

This rule is for the protection of the dealer from being deceived as to the precise authority of the agent where the means are not at hand to ascertain and determine it; but no such reason exists in the case where the agreement is made with an agent who does not disclose his agency. The contract, in such case, is made with the agent individually; and the agent is bound by his own acts as though he was the principal. If the agent discloses the fact that he is acting for a principal, naming the principal for whom he is acting, then the agent personally is not bound, and if credit is given the person giving it must look to the principal. But if the principal is not disclosed by the agent at the time of the contract, and it is subsequently ascertained that he was acting as agent, then the seller may look either to the principal or agent; but in order to hold the principal under such circumstances, it must be shown that the agent acted according to his authority, or that his acts had been subsequently ratified and confirmed. *Id.*

It is said in Dunlap's *Paley on Agency*, page 248, that the broker may buy in his own name without disclosing his principal, and if, before payment, the seller discovers that the purchase was in fact made for another, he may, at his choice, look for payment either to the broker or the principal; to the former upon his personal contract, to the latter upon the contract of his agent, and the adoption of the purchase by the principal will be evidence of the agent's authority. But if, after the disclosure of the principal, the seller lies by and suffers the principal to settle with his

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broker for the amount of the purchase, he cannot afterwards charge the latter so as to make him a loser, but will be deemed to have elected the broker for his debtor.

Story, in his work on Agency, at section 291, says that, when the agent acts without disclosing that he is acting as an agent or when acting as a known agent he does not disclose the name of his principal, though credit is given to the agent, it is not deemed to be an exclusive credit.

But when the principal is discovered, he will also be deemed responsible as well as the agent. To this liability of the principal, there is the qualification annexed that nothing has in the meantime passed between the principal and the agent to alter the state of their accounts or otherwise to operate injuriously to the principal, if he has acted in the belief that exclusive credit was given to the agent, and that there has been no laches on the part of the creditor.

In 1 Parsons on Contracts, 63, it is stated that an undisclosed principal, subsequently discovered, may be made liable on the contract of his agent, but, in general, subject to the qualification that the state of the account between the principal and agent is not altered to the detriment of the principal.

In the case of *Armstrong v. Stokes*, L. R. 7 Q. B. Cases, 598, it was held that a vendor who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the latter has *bona fide* paid the agent at the time, when the vendor still gave credit to the agent and knew of no one else as principal.

In the case of *Fish v. Wood*, 4 E. D. Smith, 327, it was held that, where an agent buys in his own name without disclosing his principal, but for the benefit of the latter, though within his authority as agent, and the principal without any notice of the purchase or of the claim of the vendor, pays his agent for the goods, he cannot be made liable afterwards to the vendor.

It was held, in the case of *McCullough v. Thompson*, 45 Super. Ct. 449, that in a sale of goods to an agent who purchases in his own name and to whom the credit is given, the principal is not liable to respond to the vendor for the price of the goods, where it appears that the principal has paid the agent for the goods.

In the case of *Knapp v. Simon*, *ante*, the court of appeals laid down the rule in substantially the following terms: The effect of a purchase of property by an agent who does not disclose the name of his principal at the time of such purchase, is to render the agent personally liable to the vendor for the purchase price. The agent is under no legal or moral obligation to make such disclosure, and the only consequence of an omission is to create a liability which he might escape by informing the vendor of the circumstance of his agency and the name of his principal. The vendor may, however, upon discovering the name of the principal in the transaction,

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also hold him responsible for the price of the property bought, provided he has not in the meantime, in good faith, paid such price to the agent.

Where an agent buys in his own name, but for the benefit of his principal, without disclosing the name of the principal, the rule is that the principal as well as the agent will be bound, provided the goods are received by the principal; but this rule is subject to at least three limitations and exceptions: First. The purchase of the agent must be within the power conferred upon him by his principal, or it must be shown that the principal has subsequently ratified his acts. Second. If the principal, before the purchase, furnished the agent with the money with which to make the purchase, and the agent should, without his knowledge, purchase the property upon credit without disclosing his principal, the latter will not be bound. Third. Where the purchase has been made by the agent upon credit, authorized by the principal, but without disclosing his name, and payment is subsequently made by the principal to the agent in good faith before the agency is disclosed to the seller, the principal will not be liable.

Other cases.—Where goods are sold on credit to a person whom the vendor believes to be the purchaser, and he afterwards discovers that the person credited bought as agent for another, the vendor has a cause of action against the principal for the purchaser price. *Kayton v. Barnett*, 116 N. Y. 625.

In this case plaintiff sold and delivered to a party several machines and assigned to him certain letters patent for the agreed price of \$4,500. The latter paid \$3,000 on delivery and gave notes for the balance. While the plaintiffs and the purchaser were negotiating, the former stated that they would not sell the property to the defendants, and the purchaser assured them that he was buying for himself and not for defendants. The latter, however, directed every step taken by the purchaser in his negotiations with plaintiff. The property was purchased for, and delivered to, the defendants, who have ever since retained it. They paid the \$3,000 towards the purchase price, and agreed with the purchaser, after the notes had been delivered, to hold him harmless from them. Subsequently the acting purchaser died insolvent without having paid the notes, or any part of them. It was held that the plaintiffs could maintain an action directly against the defendants for the balance of the purchase money.

Notwithstanding the assertion of the plaintiffs that they would not sell to the defendants they, through the circumvention of the acting purchaser and the defendants, did sell the property to the defendants, who have had the benefit of it and have never paid the remainder of the purchase price, pursuant to their agreement. The purchaser was the defendant's agent. His mind was, in this transaction, the defendants' mind; and the defendant's having, through their own and their agent's deception, acquired the plaintiff's property by purchase, cannot successfully assert that they are not liable for the remainder of the purchase price because they, through their agent, succeeded in inducing the plaintiffs to do what they did not

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intend to do, and perhaps would not have done, had the defendants not dealt disingenuously.

It was *held* in *Foster v. Persch*, 6 Daly, 164, that, where a business is carried on in the name of a wife, by a husband, acting ostensibly as her agent, in order to conceal his property from creditors, a person who, with knowledge of the facts, sells goods to the husband, and charges them to him, cannot recover against the wife as principal.

In *Yenni v. Ocean Bank*, 5 Daly, 421, it was *held* that, where one to whom a fraudulent warehouse receipt has been transferred, which in fact confers no title, authorizes the fraudulent assignor to sell, he cannot be made liable to a purchaser, as an undisclosed principal.

Opinion of the Court, by FINCH, J.

OAKVILLE COMPANY, Appellant, v. THE DOUBLE-POINTED
TACK COMPANY, Respondent.

Court of Appeals, April 19, 1887.

Equity. Jurisdiction.—Where plaintiff, in an action to reform a contract on the ground of mistake, fails to establish the alleged mistake, he is not entitled, in such action, to a judicial construction of the original contract. Such construction is a purely legal question to be determined in an action brought to enforce the contract.

Action brought to obtain a reformation and construction of a written instrument.

Appeal from a judgment of the general term of the supreme court, affirming judgment for defendant.

The action was brought to obtain a construction and reformation of a written instrument, assigning letters patent to plaintiff and providing that he should make and sell 25,000 gross of pins, paying royalty thereon, or the patent should revert to the assignor. Plaintiff asked that the contract be construed so that he might pay a royalty to defendant for the pins actually sold and claimed that his failure to sell the amount named merely gave the defendant the right to terminate the license.

Stearns & Curtis, for plaintiff and appellant.

U. W. Tompkins, for respondent.

FINCH, J.—The complaint in this action alleges a mistake in the written contract between the parties, and seeks its reformation so as to correctly express their agreed purpose and intention. The trial court has found, as matter of fact, that no mistake existed, and upon evidence quite sufficient to support the findings. That, of course, defeats the action so far as its substantial purpose is concerned.

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But the plaintiff seeks to raise a further question over the construction of the contract as originally drawn, and insists that its true meaning is precisely what it would have been if the instrument had been reformed in accordance with the prayer of the complaint. That is a purely legal question, which does not belong to the equitable action before us. It will arise, if at all, when one party sues the other for royalties claimed to be due, and may then be determined properly and correctly, and with an effective result. The remedy at law is obvious and adequate, and no ground exists for the interposition of equity.

The exceptions taken to the exclusion of evidence as to what is "customary" in making similar contracts, and to that of the existing agreement between the defendant and the original patentee, need not be discussed. The ruling of the court in each instance involved no error.

The judgment should be affirmed, with costs.

All concur.

THE MANUFACTURERS AND TRADERS' BANK OF BUFFALO,
Respondent, v. HARRIET M. KOCH. Administratrix, etc.,
et al., Appellants.

Court of Appeals, April 19, 1887.

1. *Chattel mortgage. Fraud a question for the jury.*—The question whether the mortgagee gave the mortgagors permission to sell the mortgaged property, on the denial of the mortgagee, is properly submitted to the jury, under a charge that, if they found that there was an agreement or understanding that the mortgagors might sell the mortgaged property, and use the proceeds as they saw fit, it invalidated the mortgage.
See note at end of case.
2. *Same.*—Even though a creditor does not know that the property of a firm is liable to be interfered with by individual creditors of a member, he has a right to demand that his firm claim be secured by a

Opinion of the Court, by RAPALLO, J.

chattel mortgage, so as to have a preference over such individual creditors; and securing such a preference is not a fraud.

3. *Charge. Abstract proposition.*—The court may properly refuse to charge an abstract proposition, though correct in substance, which is unnecessary and immaterial.
4. *Same. Notice of sales.*—The fact that the mortgagee had notice of sales by the mortgagors, and of the appropriation of the proceeds, is at the most, only evidence from which a previous agreement to permit such sales and appropriation might be inferred, and not a ground for a direction to the jury to find for the defendant.
5. *Evidence. Intent.*—Though a party may be examined as to his own intentions and motives when a question of fraudulent intent on his part is in issue, he cannot be permitted to testify as to the motives or intent of another party.
6. *Same. Re-direct examination.*—The court may, in its discretion, refuse to allow a witness, on re-direct examination, to be further examined as to matter called out on the direct, but not referred to in the cross-examination.

Action for the conversion of certain personal property, brought originally against defendant's intestate, who as sheriff had levied upon the property.

Appeal from the general term of the superior court of Buffalo.

Matthew Hale, for appellant.

John S. Millburn, for respondent.

RAPALLO, J.—This action was brought against Harry H. Koch in his lifetime as sheriff of Erie county. He having died after judgment, it was continued against the present defendant as his administratrix. The cause of action was the taking and conversion by the sheriff of certain personal property which was claimed by the plaintiff by virtue of a chattel mortgage made to it by Lauren C. Woodruff and Alfred B. Benedict, composing the firm of L. C. Woodruff & Co., of the city of Buffalo, to secure certain partnership liabilities of that firm. The mortgage covered the stock in

trade and other chattels of the firm, and was dated the 30th of October, 1884, and duly filed the same day.

The mortgagee took actual possession of the mortgaged property on the 26th of November, 1884, and continued in possession down to the 26th of December, 1884, when it was levied upon and taken from its possession by the sheriff, who justified the taking under two executions issued on the 19th of December, 1884, upon judgments recovered the same day against said firm of L. C. Woodruff & Co., and alleged that the chattel mortgage under which the plaintiff claimed title was not made in good faith, and was in fraud of the creditors of L. C. Woodruff & Co., the mortgagors. On the trial the question of fraud was submitted to the jury, and they found in favor of the plaintiff, who had judgment on the verdict. That judgment was affirmed by the general term, and the defendant now appeals to this court. As no opinion was rendered in the court below, we must state our reasons for affirming its judgment.

The first point urged on the part of the appellant is that the trial court erred in refusing to nonsuit the plaintiff. The ground upon which a nonsuit was claimed was, in substance, that the uncontroverted evidence established that the mortgage was fraudulent as against creditors. The evidence on the part of the plaintiff showed that at the time the mortgage was given, October 30, 1884, there was a valid indebtedness on the part of the mortgagors, as co-partners, to the plaintiff, to an amount exceeding the value of the property mortgaged, and the president of the plaintiff testified that the mortgage was given to secure then existing indebtedness, and any that might afterwards arise. The indebtedness in question arose out of dealings of the firm of L. C. Woodruff & Co. with the plaintiff, which had continued for several years before the giving of the mortgage; and it appeared in evidence that in the spring of 1884 the plaintiff had required security from the firm, and they

had given it a similar mortgage, but that after the giving of that mortgage, the firm had continued in possession of the mortgaged property, and had carried on its business, in the course of which it had sold a large part of the mortgaged stock, and had replaced it by new purchases, which were not covered by the mortgage, and that the mortgage of October 30, 1884, was given with the view of covering such after acquired property. During the running of the first mortgage, and before the giving of the second, the plaintiff had made an arrangement with Mr. Richardson, the book-keeper of L. C. Woodruff & Co., for an agreed compensation, to look after the interests of plaintiff as mortgagee, but no actual possession was taken by or on behalf of the mortgagee until about a month after the giving of the second mortgage, viz., November 26, 1884, when, the mortgage debt having become due, the plaintiff put a deputy sheriff in charge of the property. An arrangement was then made, allowing sales of the mortgage stock, the proceeds to be paid over to the plaintiff as mortgagee, and applied on the mortgage, and afterwards, and before the levy by the sheriff, the plaintiff, as mortgagee, gave public notice of the sale of the property under the mortgage.

It was claimed on the part of the defendant that the mortgage given in the spring of 1884 was not intended as a security to the plaintiff, but for the purpose of protecting the property against the claims of the creditors of the mortgagors, and enabling them to continue their business for their own benefit; that it was agreed that the mortgagors might make sales for their own benefit; and that the mortgage of October 30, 1884, was a mere renewal or continuation of the previous mortgage. All these points were controverted by testimony on the part of the plaintiff, and presented questions of fact for the jury. The only evidence of actual intent to defraud creditors was to the effect that Lauren C. Woodruff, one of the mortgagors, was indebted on some individual transactions of his own; that L.

C. Woodruff & Co. were apprehensive that these individual creditors of Woodruff might interfere with the property of the firm; and that one object of giving the mortgage to the plaintiff was to protect the firm property against these individual creditors; and there was some evidence to the effect that the plaintiff was aware of these facts. But, on the other hand, the evidence was that the mortgage was demanded by the plaintiff by direction of a committee of its directors, because it had ascertained that a portion of the mortgaged property had been sold, and it required a new security for the indebtedness to it. Even if it did not know that the property of the firm was liable to be interfered with by individual creditors of Woodruff, it had a right to demand that it should be secured, so as to have a preference over such individual creditors; and securing such a preference was not a fraud. All these questions were properly submitted to the jury as questions of fact. The court charged the jury that it was for them to say whether the second mortgage was given for the purpose of securing the debt to the plaintiff, and nothing else; that, if given with the view of defrauding the creditors of L. C. Woodruff & Co., it was fraudulent as matter of law.

The allegation that permission was given to the mortgagors to sell the mortgaged property was denied on the part of the plaintiff, and neither of the mortgagors testified to any arrangement or understanding allowing such sales. It does not distinctly appear what sales, if any, of mortgaged property were made after October 30, 1884, and before November 26th, or that the plaintiff had knowledge of them; for there was property in the store of L. C. Woodruff & Co. not covered by the mortgage. The court left the question to the jury charging them that if they found that there was an agreement or understanding that the mortgagor might sell the mortgaged property, and use the proceeds as they saw fit, it invalidated the mortgage.

We think the court committed no error in refusing to

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nonsuit the plaintiff, and that the question was properly submitted to the jury.

Some exceptions were taken to the charge, which are now insisted upon:

1. The court was requested to charge that "the possession of the bank by Richardson was not such a possession by the bank as to remove the case from under the statute." The court refused to charge otherwise than it had already charged. Aside from any criticism of the form of this request, we think the charge asked for, although perhaps correct in substance as an abstract proposition, was quite unnecessary and irrelevant. It does not appear to have been claimed by the plaintiff that, by means of the arrangement with Richardson, the mortgage was accompanied by an immediate, and followed by an actual and continued, change of possession of the mortgaged property so as to prevent the application of the statutory presumption of fraud arising from the want of such a change of possession, or to relieve the plaintiff of the *onus* of establishing affirmatively the *bona fides* of the mortgage. On the contrary, the cause was tried on the theory that the mortgage was not accompanied by an immediate change of possession. The plaintiff assumed the burden of proving its *bona fides*, and the court charged the jury that it was incumbent upon the plaintiff to show that its debt was a just debt, and that the mortgage was made in good faith, and without any intent to defraud. This charge gave to the defendant all the benefit which he could have derived from a charge in express terms that no such immediate and actual change of possession had been proved as was required by the statute to relieve the plaintiff from the presumption of fraud, or from the *onus* of affirmatively proving the good faith of the transaction. The arrangement with Richardson was one of the circumstances of the case which the jury were permitted to consider, not on the question of an actual change of possession, but on this question of good faith. The court had charged on that sub-

ject that it was for the jury to say whether the arrangement with Richardson, "if made, was made in good faith, and the intent was a change of possession and control or, on the other hand, was a blind, as it had been called by counsel." This charge was not excepted to. The court had in no part of the charge instructed the jury or even permitted them to find, that the arrangement with Richardson, whatever was its intent, was effectual to bring about the actual change of possession required by the statute, but left it to the jury to determine its intent only as a bearing upon the question of good faith; and when requested to charge, as an abstract proposition, that it was not such a possession by the bank as to remove the case from under the statute, it did not negative that proposition, but declined to charge further on the subject than had already been charged. In this refusal we find no error.

2. The court was requested to charge that if the jury found that the plaintiff had an agent in the store of the mortgagors during the time the chattel mortgage was in existence who knew the full facts of sales out of the mortgaged property, and that the mortgagors disposed of the proceeds of such sales for their own account; that the jury should find for the defendant. The court declined so to charge on the ground that the testimony did not warrant the statement of assumed facts. In this refusal we think the court was correct, as well for the reason assigned by it as for the further reason that the proposition applied to the first mortgage as well as to the second, and no distinction was made. Even if Richardson knew of sales during the running of the first mortgage, and could be presumed to have assented to them, that would not be a conclusive defense to the plaintiff's claim under the second mortgage, and thus authorize a charge that the jury must find for the defendant. No authority was shown to Richardson, in either case to consent to sales by the mortgagors, nor does it clearly appear that he was cognizant of them, or of the application

of the proceeds. But at all events, even if the bank, through Richardson, had notice of sales by the mortgagors, and of the appropriation of the proceeds, such notice, at the most, was only evidence from which a previous agreement to permit such sales and appropriation might be inferred. It was not ground for a direction to the jury to find for the defendant. *Gardner v. McEwen*, 19 N. Y. 126; *Potts v. Hart*, 99 N. Y. 168, 178.

3. The same answer applies to the further request to the court to charge that, if the jury found that Richardson was the agent of the plaintiff to look after the mortgaged stock, they must find that the plaintiff agreed to the sales made of the stock during the time.

These are all the exceptions to the charge which are insisted upon in the appellant's points in this court.

There are some exceptions to rulings upon questions of evidence, but we are of opinion that they present no point which requires a reversal of the judgment. Certain questions relating to the intent or motives of the mortgagors in executing the first and second mortgages were asked of the officers of the mortgagee, and excluded. A party may be examined as to his own intentions and motives when a question of fraudulent intent on his part is in issue, but he cannot be permitted to testify as to the motives or intent of another party.

Exception was also taken, and is now insisted upon, to the exclusion of testimony of Lauren C. Woodruff, offered on his re-direct examination, for the purpose of showing that the first mortgage was fraudulent. Woodruff had been called as a witness by the defendant, and had been examined for the purpose of showing fraud in the second mortgage. He detailed the circumstances and the conversations which led to its execution, and was examined as to his intentions in giving it, and as to his individual embarrassments. He was also examined, on his direct examination, with reference to the first mortgage, and stated that the second mort-

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gage was given as a renewal of the first; that the president of the plaintiff claimed that a great part of the goods covered by the first mortgage had been sold, and new goods had come in, and it had ceased to be a security, and requested that a new inventory be taken, and a new mortgage executed and that witness assented to the request. On his cross-examination on the part of the plaintiff, the witness was not asked anything about the first mortgage, but only as to the second, and his motives for giving it. Being then re-called on the part of the defendant, Mr. Woodruff was asked whether the first mortgage was ever intended to be enforced. Objection being made to this question, the defendant's counsel offered to prove that the first mortgage was fraudulent. The court refused to permit the proof to be made by the witness then on the stand, stating to counsel that that was part of his direct examination. We think this ruling was a proper exercise of the discretion of the court, and further, that the question asked the witness was in itself improper, as he was not competent to testify to the intention of the plaintiff with respect to enforcing the mortgage. This, if material, must be shown by circumstances or the declarations of the party.

The judgment should be affirmed.

All concur.

NOTE ON EFFECT OF CONSENT BY THE MORTGAGEE TO THE MORTGAGOR TO SELL THE MORTGAGED GOODS.

The fact that the mortgagor continues in the possession of the goods, after the execution of the chattel mortgage, and sells a portion of them without the knowledge of the mortgagee, and in the absence of an agreement to that effect, does not alone render the mortgage void as to creditors.

Nor does a clause in the mortgage, which purports to extend its lien over after-acquired property, have this effect, in the absence of any arrangement permitting the mortgagor to deal with property, and of an intent to defraud creditors, where the mortgagee has no knowledge of such dealing on the part of the mortgagor.

An agreement contained in the mortgage or outside of it, either in writ-

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ing or parol, between the parties, that the mortgagor may sell, for his own benefit and as his own property, the whole or any portion of the mortgaged property, will render the mortgage fraudulent and void as to creditors. Such an agreement equally invalidates the mortgage, whether made at the time of, or subsequent to, the execution of the mortgage.

But an agreement that the mortgagor should sell the property, and, upon such sales, pay the proceeds to the mortgagee to be applied by him in discharge of the mortgage, is legal, and does not *per se* impair the validity of the mortgage.

This certainly is the case when the sales are made for cash; but when the sales are made for credit, the accounts for the credit sales, in order not to impair the mortgage, must be, by force of the agreement, transferred to the mortgagee immediately upon the sales, and applied by him as so much cash in payment. But where the agreement does not require an immediate payment and application upon the mortgage, the mortgage is rendered fraudulent in law as against the creditors. In either case, such agreement is a circumstance to be considered in determining the question of intent.

When sales are made under such an agreement, the mortgagor is made the agent of the mortgagee for the purpose of selling the mortgaged property, and the proceeds of the sales, whether received by the mortgagee or not are applied in reduction of the mortgage indebtedness, as against the rights of the mortgagor's creditors.

Even where the mortgagor sells the goods and applies the avails to his own use, without the assent of the mortgagee to the misappropriation, the law, as between the mortgagee and the other creditors of the mortgagor, applies the money thus realized on the indebtedness secured by the mortgage.

Whether, in a given case, a mortgage, given under such an arrangement, is fair or fraudulent, is usually a question for the jury to determine. But if the question depends on the construction and effect of a written instrument; or, if it should arise upon an admitted or undisputed state of facts which show an arrangement inconsistent with fairness and honesty, it becomes a question of law for the court to decide.

Where the question arises between the mortgagor and the mortgagee, in case of misappropriation of the avails of the sales of the mortgaged property by the mortgagor to his own use, the latter cannot take advantage of his own wrong, but remains liable to the mortgagee for the money received and misapplied by him.

Sale by mortgagor without consent.—The mere fact that the mortgagor continued in possession, and sold part of the goods in the usual course of business, in the absence of any agreement to that effect, does not render it void as to creditors. *Hastings v. Parke*, 22 Alb. L. J. 115.

In *Yates v. Olmsted*, 56 N. Y. 632, it was held that a clause in the chattel mortgage upon a stock of goods, which purports to extend the lien of the mortgage over after-acquired property, does not render the mortgage ab-

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solutely void, where there is no arrangement permitting the mortgagor to deal with the mortgaged goods, and no knowledge of such dealing on the part of the mortgagee, and the absence of an intent to defraud creditors is affirmatively found.

It was held, in *Manchester v. Tibbetts*, 49 Hun, 612, that, where there is no agreement or understanding between the parties to a mortgage, at the time of the execution thereof other than the usual covenants contained in the mortgage, the fact that the mortgagor sold some of the articles may not be sufficient to avoid the mortgage. See *Southard v. Benner*, 72 N. Y. 424; *Brackett v. Harvey*, 91 Id. 214; *Sperry v. Baldwin*, 46 Hun, 124.

The clause in a chattel mortgage, "to keep about the same amount of stock on hand," does not, by necessary implication, give the mortgagor authority to sell for cash or on credit, provided only he keeps the same amount on hand, and such an authority or agreement, on the face of the mortgage, does not make it void as matter of law. *Stedman v. Batchelor*, 54 Hun, 638.

In *Edgell v. Hart*, 9 N. Y. 213, the purchaser of a stock of goods in a retail store executed to the vendor a mortgage upon the entire stock, and all articles of like nature which might be in the store at the time of the default; the mortgagor was to remain in possession, but was forbidden by a clause in the mortgage from selling on credit. It was held that the mortgage was, in its terms, fraudulent as against creditors, and that there was no question to be submitted to the jury in regard to it. The clause in this mortgage as to selling on credit, was, "said party of the first part not to sell any of the said goods upon credit." This was held, by a necessary implication, to authorize the mortgagor to sell for cash, and that this right to sell, if it stood alone, would vitiate the mortgage.

In *Mittnacht v. Kelly*, 3 Keyes, 407, the mortgage covered the whole stock of trade in goods, wares and merchandise with increase and decrease thereof. This was held to be void on its face, as it showed an intent not to create an absolute, but a fluctuating, lien, that should open to release that which should be sold and take in what should be newly purchased.

In *Griswold v. Sheldon*, 4 N. Y. 581, the mortgage contained, on its face, a provision that the mortgagor should keep a good and full assortment of goods, groceries, etc., during the time he remains in said store and until the mortgage's debt should be fully paid.

Five judges of the court of appeals concurred in holding that such a provision would render the instrument void, and four were of opinion that, where the mortgagor was allowed by the mortgagee to sell the mortgaged chattels, though not in pursuance of a provision in the instrument, the mortgage would be invalid in law, whatever a jury might think of it. And it is so with any conveyance of chattels which would leave to the owner the right of selling them as his own. The existence of such a provision out of or in the mortgage will invalidate it as matter of law; and, where the facts are undisputed, the court will so declare. The manifest tendency of such

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arrangements to defraud creditors by giving to the mortgagor a false credit, and their incongruity with a just and legal idea of a mortgage, are sufficient to condemn them. *Edgell v. Hart, ante.*

In *Edgell v. Hart, ante*, the scope of the written arrangement between the parties was that the mortgagor should carry on a retail store, making purchases from time to time and selling off in the ordinary manner, and the mortgagee all the time should retain a lien on the whole stock by way of mortgage; under which, the mortgagee could upon a default take possession of the remaining goods, whether they were those owned by the mortgagor at the giving of the mortgage or purchased subsequently, and sell them for the payment of his debt. And the question was whether by law such an arrangement is void against creditors.

A person engaged in traffic and indebted cannot make a valid contract or conveyance in favor of one creditor, by which the latter shall possess a lien upon all the chattels which the debtor shall from time to time have on hand, allowing him to sell and purchase like an unqualified owner, while the lien attaches only to what may be on hand at the time it is sought to be enforced. The right to sell, even if it stood alone, would vitiate the mortgage.

Consent to sell. When it vitiates the mortgage.—An agreement by the mortgagee made with the mortgagor that the latter may sell, for his own benefit and as his own, portions of the property covered by the mortgage, renders the mortgage fraudulent and void as to such portions. *Russell v. Winne*, 87 N. Y. 591. A creditor, for the purpose of securing a debt, has a right to take a mortgage upon chattels from his debtor, and leave the same in possession of the latter, upon assuming the burden of showing that the transaction was in good faith, and without any intent to hinder, delay or defraud the creditors of the mortgagor, and also by complying with the other requisites of the statute. *Id.*

But, if there is an agreement by the mortgagee that the mortgagor may sell or dispose of any of the property for his own benefit, it is established, conclusively, that the mortgage was given for some purpose other than that of securing a debt to the mortgagee, or of giving him any interest in such property. *Id.* Such an agreement shows that the mortgage was not made in good faith, and without a design to hinder creditors. In such case, there is no question of intention to be submitted to a jury. The court should pronounce it void for the reason that the evidence conclusively shows it fraudulent. Though in *Edgell v. Hart, ante*, the agreement authorizing the mortgagor to sell the property for his own benefit, was contained in the mortgage, this circumstance can make no difference in regard to the validity of the mortgage. The effect is precisely the same, whether the agreement is contained in, or made separate from, the mortgage; whether its existence is proved by writing, or otherwise. In all such cases, the inquiry is as to its existence; and if so, the same judgment as to its effect should be pronounced. *Russell v. Winne, ante.*

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In *Wood v. Lowry*, 17 Wend. 492, the same doctrine was announced, though the agreement was not contained in the mortgage. This case was overruled by *Smith v. Hoe*, 23 Wend. 653, upon another point, but has never been so, as to the point now in question. The same rule was asserted in *Gardner v. McEwen*, *ante*, although the point was not passed upon by the court. See also *Griswold v. Sheldon*, *ante*. The cases of *Conkling v. Shelly*, 28 N. Y. 360 and *Miller v. Lockwood*, 32 N. Y. 293, are not in conflict with, but tend to sustain, the rule.

It may, therefore, be regarded as settled, that an agreement between mortgagor and mortgagee that the former may dispose of the mortgaged property to his own use, renders the mortgage fraudulent as to creditors, whether the agreement is contained, or not contained, in the mortgage. And it would seem to follow that, if such agreement, as to the whole property covered by the mortgage, avoids the entire mortgage, the same agreement as to a part of the property will avoid it as to that portion. And it is questionable whether it will not avoid the whole mortgage. To render it valid, it must have been given in good faith, and for the honest purpose of securing the debt, but this cannot be true when the object, in part, or as to part of the property, is to defraud creditors. This unlawful design vitiates the entire instrument, and cannot be confined to one particular parcel of the property. *Id.*

In *Southard v. Benner*, *ante*, a dealer in lumber mortgaged his entire stock to secure advances made to enable him to continue his business; an agent of the mortgagees was designated and appointed to supervise the business and watch their interests; sales were continued by the mortgagor as before, and the avails used by him for his support, and as his wants and business calls demanded, and this continued for a year; and the mortgagees received none of the avails of the mortgaged lumber, but such moneys as the mortgagor could spare from the general business. This was done in pursuance of an agreement between the parties cotemporaneous with the mortgage. It was held that such an arrangement was incompatible with the mortgage designed only as security to the mortgagees.

The dealing with the mortgaged property as a merchandise by the mortgagor, and the sale of the same in the ordinary course of business as a merchant with the consent of the mortgagees, necessarily destroy the value of the mortgage as a security, and make it only available, if for any purpose, so long as this arrangement and dealing continued to protect the property from creditors, and secure it to the mortgagor. Such a transaction is necessarily fraudulent. It hinders and delays other creditors, without securing the application of the property or its avails to the payment of the mortgage debt. *Id.*

Such arrangement, included in and making a part of the written instrument of mortgage, would clearly invalidate it as fraudulent in law, as that term is understood. It would be conclusive evidence of fraud in fact, and would be so held by the court as matter of law. *Id.* See *Edgell v. Hart*,

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ante. Whether the agreement is in or out of the mortgage, whether verbal or in writing, can make no difference in principle. Its effect, as characterizing the transaction, would be the same. The difference in the modes of proving the agreement cannot take the sting out of the fact and render it harmless. If it is satisfactorily established, the result upon the security must be the same. It is the fact that such an agreement has been made and acted upon that in law condemns the security, and not the fact that it is proved by the instrument of suretyship, instead of by parol or in some other way. This question was considered in *Gardner v. McEwen*, *ante*, and in *Russell v. Winne*, *ante*, and, though not expressly decided in either case, it was very conclusively shown by the reasoning of the court that an agreement, by which the mortgagor is permitted to deal with the mortgaged property, outside of the mortgage, and proved by parol, is equally fatal to the security as though made a part of the written mortgage.

In *Potts v. Hart*, *ante*, plaintiff's intestate, being indebted to the defendants, executed to them a chattel mortgage on all the goods and merchandise in his store. He subsequently died, and the plaintiff was appointed administrator of his estate. Default was made in the payment of the mortgage, and defendants took from the possession of plaintiff so much of the goods as they could find in the store formerly occupied by the intestate. And plaintiff commenced an action for the conversion of the goods. The mortgage was given with a tacit or expressed understanding and arrangement between the parties that the mortgagor should be permitted to deal with the property for his own benefit. It was held that such a state of facts rendered the mortgage fraudulent and void as to creditors. *Wood v. Lowry*, *ante*; *Chatham Bank v. O'Brien*, 6 Hun, 231; *Griswold v. Sheldon*, *ante*; *Gardner v. McEwen*, *ante*; *Russell v. Winne*, *ante*; *Southard v. Benner*, *ante*; *Brackett v. Harvey*, *ante*.

A mortgage thus given is fraudulent and void as to creditors, because it must be presumed that, at least one of the purposes, if not the main purpose, for giving it, was to cover up the mortgagor's property and thus hinder and delay his other creditors. It matters not whether the agreement that the mortgagor may continue to deal in the property for his own benefit, is contained in the mortgage or exists in parol outside of it; and, where the agreement exists in parol, it matters not whether it is valid so that it can be enforced between the parties or not; for whether valid or invalid, it is equally effectual to show the fraudulent purpose for which the mortgage was given, and the fraudulent intent which characterizes it. It is always open to creditors to assail, by parol evidence, a mortgage or a bill of sale of property as fraudulent and void as to them. *Potts v. Hart*, *ante*. While, between the parties, the written contract may be valid, and the outside parol agreement may not be shown or enforced, yet it may be shown by creditors for the purpose of proving the fraudulent intent which accompanied and characterized the giving of the written instrument. *Id*.

It is usually difficult to prove, by parol, an agreement in terms that the

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mortgagor may continue to deal in the property for his own benefit. Parties concocting a fraudulent mortgage would not be apt to put the transaction in that unequivocal form. But all the facts and circumstances surrounding the giving of the mortgage, and the subsequent dealing in the property with the knowledge and assent of the mortgagee, may be shown, and they may be sufficient to justify the court or jury in inferring the agreement. In many of the cases, the parol agreement was inferred from such facts and circumstances. *Id.*

Such a mortgage would be fraudulent and void as to creditors, if it was the arrangement between the mortgagor and mortgagee that the former might continue to deal in the mortgaged property for his own benefit so long as the latter consented thereto. By such an agreement it is in the mortgagee's power to assent that all the property should thus be sold, and thereby deprive the mortgage of its character as a security. The parties to a mortgage cannot play fast and loose with the mortgaged property and thus hinder and delay creditors. *Id.*

In *Hanger v. Hachemeister*, 114 N. Y. 566, a chattel mortgage was executed upon the wines, liquors, articles of furniture belonging to the mortgagor, and all other goods and chattels mentioned in a schedule annexed, that were at that time in a certain saloon, to secure the payment of a promissory note payable one year from date. It was executed under an agreement that the mortgagor should continue in the possession and have the full and free enjoyment of it, with the right to sell and dispose of the wines, ales, liquors and cigars for his own benefit and advantage without applying the proceeds upon the mortgage debt. And it was held that the mortgage was void as to the creditors of the mortgagor; and that such agreement may be proved by parol, or inferred from the fact that the mortgagee permits the sale to be made.

In *Dodds v. Johnson*, 8 N. Y. S. C. 215, a debtor executed and delivered to his father a chattel mortgage upon liquors and furniture in the hotel kept by him, together with wood in the wood-house belonging to said hotel, and ice in the ice-house. The mortgagee authorized the mortgagor, after the mortgage was given, to sell the liquor, and to use or sell the wood and ice; and the mortgagee knew that the mortgagor was selling the liquor and using and selling the wood, and that he used the proceeds in his business. On the trial, in an action brought by the mortgagee against an execution creditor of the mortgagor, the defendant moved for a nonsuit on the ground that such consent of the mortgagee and use by the mortgagor rendered the mortgage fraudulent and void as against the creditors of the mortgagor; and this motion was denied. And it was held that the trial judge erred in refusing to nonsuit the plaintiff on this ground. Such a license renders the mortgage fraudulent and void against the mortgagor's creditors. *Griswold v. Sheldon*, *ante*. It makes no difference whether the license is in the mortgage or is a separate arrangement. See *Edgell v. Hart*, *ante*. It was held in *Russell v. Winne*, *ante*, that such

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a license, as to a part of the property mortgaged, rendered the mortgage wholly void.

Where a chattel mortgage absolutely contemplates a consumption of some of the mortgaged property, a sale of the residue, the use thereof in the business of the mortgagor, the purchase of other goods to replace those consumed, the continuance of the mortgagor in possession until a breach, and provides that the mortgage shall cover the goods to be so purchased, it is void as to the creditors of the mortgagor, or those succeeding to their rights. *Wagner v. Jones*, 7 Daly, 375.

In *City Bank v. Westbury*, 16 Hun, 458, the defendant who was a manufacturer of boots and shoes, being largely indebted, mortgaged to one of his creditors all his stock and goods manufactured and to be manufactured, upon an agreement that he should remain in possession, continue to manufacture and sell, either for cash or on credit, in his discretion, and that the cash and the accounts, when sales were made on credit, should be transferred to the mortgagee, and applied on the debt when the accounts were collected. And it was held that the mortgage was fraudulent as to creditors and void. Such an arrangement with the mortgagee would enable the mortgagor to sell his entire stock on credit and keep his other creditors at bay; and in this aspect the transaction was fraudulent *per se*.

In *Ball v. Slafter*, 26 Hun, 358, a chattel mortgage was executed containing a provision allowing the mortgagor to sell the property covered by it at retail for his own benefit. The goods were sold on credit by the mortgagor, and the proceeds were not paid to the mortgagee. And it was held that this made the mortgage fraudulent and void as to the assignee of the mortgagor for the benefit of creditors. See *Edgell v. Hart*, *ante*; *City Bank v. Westbury*, *ante*.

Where a parol arrangement between the mortgagor and mortgagee is inconsistent with the terms of the mortgage, and no mistake is alleged, the mortgage, as between the parties, expresses the true contract, and the mortgagee is bound by its terms. See *Kelly v. Roberts*, 40 N. Y. 432.

A parol arrangement that the mortgagor may sell the mortgaged goods and pay, as fast as possible, the notes, to secure which the mortgage was given, will render the mortgage fraudulent. In *Ford v. Williams*, 24 N. Y. 359, the agreement was that the mortgagor was to sell only for cash and apply the proceeds on the secured debts; but the agreement in *Ball v. Slafter*, *ante*, did not require that the sale should be for cash, and as matter of fact they were on credit; nor did it necessarily require the proceeds to be paid on the notes when the sales were made, and indeed, the proceeds of the credit sales could not be so applied. And it was intimated, in this case, that the case of *Ford v. Williams*, while it is undoubtedly the law as far as it goes, ought not to be extended or applied to any case which does not come within it on the facts.

In *Smith v. Cooper*, 27 Hun, 565, there was an agreement between the parties, in substance that the mortgagor should dispose of and deal with

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the mortgaged property as he saw fit, transmuting the mortgaged articles, either directly into stock or indirectly into money, and then purchasing new stock with the money; and that such new stock should be substituted in the place of stock disposed of, under plaintiff's lien. And it was held that this agreement, though by parol, was invalid and vitiated the mortgage, in the same manner as though it was embodied in its provisions. The agreement was in law conclusive of fraud and fraudulent *per se*. The case cannot be distinguished in principle from those of *Edgell v. Hart, ante*, and *Mittnacht v. Kelly, ante*. In these cases, it was expressly held that the intention to create a fluctuating lien, which would release the property that should be sold and take in what should be purchased, rendered a mortgage void. The authority of these cases has not been, in any way, limited by subsequent decisions. It has been held that where a mortgagor is suffered to sell the property and pay over the proceeds to the mortgagee, such an arrangement will not *per se* stamp the mortgage as fraudulent; but the receipts from such a sale will be applied to the satisfaction of such mortgage lien, even though such proceeds are not actually paid over to the mortgagee. But the agreement in *Smith v. Cooper, ante*, was not of such import. In this case, the proceeds of the sale were not to go in satisfaction of the debt, but were to be applied to the purchase of new stock, which was not to become the property of the mortgagee, but simply to become subject to his mortgage lien. Such an agreement undoubtedly vitiated the mortgage *in toto*, as to all the property included in it. See *Edgell v. Hart, ante*.

In *Quinn & Nolan Beverwyck Brewing Co. v. Hart*, 48 Hun, 393, an action was brought to recover the possession of certain chattels, of which the plaintiff took possession under a chattel mortgage given by the owner to them. The sheriff under a judgment docketed September 29, 1886, in Columbia county, and in Albany county, December 4, 1886, levied an execution on the mortgaged chattels. The mortgagor delivered the mortgaged goods to the plaintiff, under its chattel mortgage on December 8, 1886, and the actual and continued possession remained in the plaintiff from that time until the levy. The mortgagor continued to sell the mortgaged property after the mortgage was given, and used the proceeds in his business and for living expenses. And it was held that the mortgage was void by reason of the agreement that the mortgagor might sell the mortgaged property and apply the avails to his own use, without accounting to the mortgagee. See *Potts v. Hart, ante*.

Where a chattel mortgage is executed, which is fraudulent against creditors by reason of an agreement to permit the mortgagor to deal in the property for his own benefit, the subsequent taking possession of the property by the mortgagee, by virtue of such mortgage, does not entitle him to hold it against a levy of a creditor, thereafter made, whose debt accrued before the mortgagee took possession. It was so decided in *Dutcher v. Swartwood*, 15 Hun, 34. In *Stimson v. Wrigley*, 86 N. Y. 332, a simi-

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lar question was discussed. In this case, a person had sold goods without delivering them. Meantime he became indebted. Afterwards he delivered the goods, and subsequently a creditor levied. The same principle was applied at special term. The case was affirmed at general term, and was again affirmed in the court of appeals, *ante*, and the opinion in the case at special term, and also the opinion in *Dutcher v. Swartwood*, *ante*, were approved. But neither, in that opinion nor in the opinion in *Dutcher v. Swartwood*, does the court decide on the effect of a delivery by the mortgagor of the goods in payment of the debt.

In *Sperry v. Baldwin*, *ante*, a chattel mortgage was held void by reason of an oral agreement that the mortgagor might sell for his own benefit.

The mortgage was executed October 11, 1883, and three days afterwards the mortgagee took actual possession. In March, 1884, the plaintiffs recovered judgment on an indebtedness contracted prior to the mortgage and levied on the mortgaged property. It was held that the plaintiffs were entitled to enforce their execution out of said property.

In *Mandeville v. Avery*, 57 Hun, 78, a chattel mortgage was executed upon the understanding and agreement between the parties thereto that the mortgagor should continue to deal with the mortgaged property and sell the same in the course of business as his own property; and the said mortgagor did, in fact, after the execution of said mortgage and for some period thereafter, with the consent of the mortgagee, disposed of said property or a part thereof and appropriate the proceeds of the sale to his own use by selling as a retail merchant to his customers. The debt secured by the chattel mortgage was paid by the sale of the property more than two months before the plaintiff seized the goods by virtue of his attachment. And it was held that, when an honest debt has once been paid out of the debtor's property, another creditor can not compel the former creditor to refund, because, as against creditors, the mortgage given to secure the debt which has been paid, would have been adjudged void; the law will leave the parties where it finds them. See also *Hone v. Henriquez*, 13 Wend. 240; *Brown v. Platt*, 8 Bosw. 324; *Haggerty v. Palmer*, 6 Johns. Ch. 437; *Grover v. Wakeman*, 11 Wend. 187; *Averill v. Loucks*, 6 Barb. 470.

When it does not avoid the mortgage.—Where there is an agreement or understanding between the mortgagor and mortgagee, made at the time the chattel mortgage is executed, that the latter may sell the mortgaged property and apply the proceeds to his own use, the transaction is, without doubt, fraudulent. *Spaulding v. Keyes*, 52 Hun, 612; *Potts v. Hart*, *ante*.

In the former case, the understanding and agreement, as shown by the evidence, was, that the proceeds of the property as sold should be paid to the mortgagee and applied in discharge of her mortgage, which was done. Such an agreement is legal, and does not impair the validity of the mortgage. See *Brackett v. Harvey*, *ante*.

In *Chatham Nat. Bank v. O'Brien*, 6 Hun, 231, it was held that, where,

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in an action brought to recover property described in a chattel mortgage, a creditor alleges that the mortgage is void, because the mortgagor was authorized and allowed to sell the mortgaged property for his own benefit, the court cannot direct a verdict for such creditor, unless an agreement has been made, either in the mortgage itself or between the parties to it, the necessary construction of which permits such sales to be made. And see *Frost v. Warren*, 42 N. Y. 204; *Gardner v. McEwen*, *ante*; *Edgell v. Hart*, *ante*; *Griswold v. Sheldon*, *ante*; *Ford v. Williams*, *ante*; *Conkling v. Shelley*, *ante*; *Miller v. Lockwood*, *ante*.

In *Carins v. Richmond*, 22 Hun, 369, there was an agreement between the parties to the chattel mortgage, made before and at the time of its execution, that the mortgagor might manufacture the property covered by the mortgage and sell it; and that, when sold, he should pay over to the mortgagee the cash received upon cash sales, and assign to him the accounts for sales that were not made for cash; and that such cash and assigned accounts should apply in payment of said chattel mortgage indebtedness, when so paid or assigned, to the amount of such cash payments and accounts. And it was held that such agreement did not necessarily make the mortgage void; that, at most, the circumstance was one to be considered in determining the question of intent. *Ford v. Williams*, *ante*.

In *Ellsworth v. Phelps*, 30 Hun, 646, the mortgage, among other things, stipulated that, so long as the mortgagee shall permit, the mortgagor is at liberty to sell any or all of said goods for cash as the agent of the mortgagee and pay the proceeds to him who will apply the same on the mortgage, and that the mortgagor shall have no right to sell except as above provided. The mortgagor remained in possession of the stock, selling therefrom and using the proceeds the same as before the execution of the mortgage. No accounting has been had of the sales and the proceeds have not been ascertained and applied upon the mortgage debt. It was held at general term that, under such an agreement, the sales should be accounted for and their amount credited and applied upon the indebtedness, to secure which the mortgage was given. See *Conkling v. Shelley*, *ante*. Such an agreement made the mortgagor an agent of the mortgagee. His possession and sales are in effect those of the mortgagee. It is as though the latter has taken possession and placed a third person in charge as agent to sell and account to him. All that remains after satisfying the mortgage belongs to the mortgagor and is subject to the liens and rights of his creditors. See *Brackett v. Harvey*, *ante*. The court did not, in *Ellsworth v. Phelps*, *ante*, pass upon the question whether the mortgage was or was not fraudulent in fact upon the evidence. See *Southard v. Benner*, *ante*; *City Bank v. Westbury*, *ante*.

In *Kerr v. Dildine*, 43 Hun, 635, the defendant sold his stock of goods and fixtures, and took from the purchaser a mortgage on the property for a part of the purchase money. The chattel mortgage, among other things, provided that the "mortgagor has the privilege of selling all of said prop-

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erty except the fixtures for cash and on credit on reasonable time, and to good responsible parties on time and credit, the mortgagor to apply, on the mortgage, and to receive and apply, the entire proceeds of said sales, both cash and credit, upon the debts secured by the mortgage, to have the privilege and may use a part of the proceeds of the sales of said property to replenish this stock with other goods of like character and value, the stock so purchased and substituted in the place and instead of those which were sold to procure it, and the proceeds of the sale of the stock so brought to replenish, also to be a part, and received and applied in the payment upon the debt which this mortgage is given to secure," etc. It was held that the provisions of the mortgage above referred to did not render the mortgage fraudulent *per se* as against the creditors of the mortgagor. The relation given to the mortgagor and taken by him was that of agency for the mortgagee in making the sales, and may be so treated as against the creditors of the former. See *Conkling v. Shelley, ante*; *Brackett v. Harvey, ante*.

Where the chattel mortgage is taken without any intent to defraud the creditors of the mortgagor, an understanding, when the mortgage was made, that the mortgagor should be at liberty to appropriate to his own use and purposes any of the proceeds of the mortgaged property, must be made to appear by a statement of facts which fairly establish or justify an inference to that effect. See *Brackett v. Harvey, ante*.

In *Southard v. Benner, ante*, and *Potts v. Hart, ante*, there was no authority vested in the mortgagor to sell the property and apply the proceeds on the mortgage, and no relation of agency, as against the creditors of the mortgagor, existed between him and the mortgagee in this respect.

An agreement made at the time of the execution of a mortgage and inserted therein, that the mortgagor might sell the mortgaged property for cash and pay the proceeds over to the mortgagee to apply on his indebtedness will not render the same fraudulent in law. *Sperry v. Baldwin, ante*; *Brackett v. Harvey, ante*. Such a provision is for the benefit and advantage of the mortgagee, and so far as the same favors the mortgagor in any respect, it is not to the disadvantage of his other creditors. While the agreement contemplates that the goods shall remain in the possession of the mortgagor, this fact alone does not vitiate the security, if it appears from the whole evidence that the transaction was not intended to cheat or defraud creditors.

Where there is a tacit understanding and agreement between the parties to the mortgage, entered into at the time of its execution, that the mortgagor may continue the business, sell the property and apply the proceeds to his own use, otherwise than by applying the same on the mortgagee's indebtedness, the transaction, as a matter of law, is void and illegal. *Sperry v. Baldwin, ante*; *Brackett v. Harvey, ante*; *Southard v. Benner, ante*.

Where the mortgagor sells goods and applies the avails to his own use, without the assent of the mortgagee to the misappropriation, this act on

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the mortgagor's part does not invalidate the security as to the mortgagee. The other creditors of the mortgagor are not injured by the unlawful diversion. The law, as between the mortgagee and the other creditors, applies the money thus realized on the indebtedness secured by the mortgage. All the avails derived from a sale of the goods made by the mortgagor, as the agent of the mortgagee, should be applied as a payment on his indebtedness. By permitting the mortgagor to sell the goods for cash, and to pay the proceeds over to him, he thereby constitutes the mortgagor his agent. And so long as the latter acts in that capacity and realizes money derived from a sale of the goods, the same at once becomes the funds of the mortgagee; and the law applies it on his indebtedness, whether it was or was not paid over to him. See also *Conkling v. Shelley, ante*.

In *Havens v. Extain*, 56 Hun, 643, the whole transaction between the mortgagor and mortgagee amounted to a security in the nature of a mortgage for the mortgagee's debt. It was claimed that the mortgagor was permitted to remain in charge of the store after the transfer, and to avail himself of the profits thereof; but any appropriation of the profits by the mortgagor prior to the payment of the mortgagee in full, was done outside and in violation of the contract. It was held that it was incumbent upon the receiver, in proceedings supplementary to execution of the mortgagor, to show, in order to avail himself of such an agreement, that the appropriation of the moneys or the proceeds of the sale was with the knowledge or consent of the mortgagee; and that, where this evidence is wholly lacking, the case is not brought within the principle of *Potts v. Hart, ante*.

In *Ford v. Williams, ante*, the mortgagee indorsed a note to enable the mortgagor to raise money at a bank, to pay off a judgment against him upon which an execution had been issued, and a chattel mortgage was given to indemnify him for his indorsement. It was held that an agreement, upon the execution of the mortgage of chattels, that the mortgagor shall keep possession and retail the goods for cash only, paying over the money to the mortgagee, was not fraudulent in law, but presented a question of good faith for the jury. But, if the debtor was permitted, not only to retain the possession of the property mortgaged, but also to sell it out by retail on his own account, the arrangement would be fraudulent and the security void. It is not inconsistent with the nature of the transaction, or with good faith, that the mortgagee, by himself or his agent, shall have been permitted to sell the goods by retail, for cash, and apply the money, which they might bring, towards the discharge of the debt which the mortgage was given to secure; yet an arrangement in these terms may be merely colorable, and a device to protect the property against the pursuit of other creditors. In most cases a jury would regard such an agreement with great suspicion and be apt to consider it a fraudulent contrivance; but still such an arrangement may possibly be made without any improper views. So that whether, in a given case, it is fair or fraudulent, is a question of fact for the jury to determine. But if the question depends upon

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the effect of a written instrument, or if it should arise upon an admitted or undisputed state of facts which show an arrangement quite inconsistent with fairness and honesty, it then becomes a question of law for the Court to decide.

In support of this principle see also *Miller v. Lockwood*, *ante*.

Where a mortgage contains a clause permitting the mortgagor, not only to remain in possession but also to dispose of the mortgaged property at his discretion and apply the proceeds to his own benefit, it will be void as a fraud upon creditors. *Conkling v. Shelley*, *ante*; *Edgell v. Hart*, *ante*. And where such agreement is made between the parties, outside of the mortgage but at the time of its execution, it will invalidate the instrument in the same manner as though it were written in its provisions. *Id.* At all events, it will be irresistible evidence of a fraudulent purpose. But an agreement that the mortgagor, while permitted to continue in possession, may sell the mortgaged property, not for his own benefit but for the mortgagee, accounting to him, and applying the proceeds of the sales to the satisfaction of the debt which the mortgage was given to secure, is not unlawful or fraudulent *per se*. *Id.* *Ford v. Williams*, 13 N. Y. 577; 24 Id. 359. The agreement that, while so in possession the mortgagor shall make sales of the property for the benefit of the mortgagee, is simply creating him an agent to do what the statute and public policy require the mortgagee himself to do, or to excuse himself for not doing, viz.: to make immediate and direct application of property of this description when it is mortgaged, to the payment of the debt. The sales by the mortgagor, for the benefit of the mortgagee and in satisfaction of the debt, are neither a fraud nor an injury to the other creditors.

The sales made and proceeds received by the mortgagor, under such an arrangement between him and the mortgagee, must be applied in payment and satisfaction of the mortgage, though the money has never been actually paid over to the mortgagee. He cannot escape from crediting on the indebtedness the proceeds of sale made by such an agent, because the latter has fraudulently or dishonestly misapplied or employed the money. The case does not resemble that of a mortgagor of real estate, who receives the rents and profits under an agreement to pay them over to the mortgagee. The mortgagee of lands has no fixed real right or title to the rents and profits and cannot be charged with them, if the mortgagor shall voluntarily agree to account for them and then fail to perform his agreement.

In such cases, the question does not arise between the mortgagee and the mortgagor, who cannot take advantage of his own wrong, but remains liable to the mortgagee for the money received and misapplied by him. But the question usually arises between the mortgagee and the other creditors of the mortgagor, who have obtained a lien or an interest in the mortgaged property after the satisfaction of the mortgage. As between these parties, the mortgagee has made the mortgagor his agent, and the latter's dealing with the property, under the agreement, will be considered as the acts of

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an agent, and not of a mortgagor, and will affect the mortgagee accordingly. *Id.*

In *Brackett v. Harvey, ante*, the mortgagors were left at liberty to sell and dispose of the mortgaged property upon a condition contained in the mortgage that they would apply the proceeds of such sales to the payment of the debt which the mortgage secured. The mortgage also contained the implied provisions that the mortgagors might sell on credit taking good business paper which the mortgagee would accept and apply on the debt; and also that the mortgagors might use a part of the avails of the sales to replenish and freshen their stock; but if they did do so, the substituted property was to be placed, by monthly renewals of the mortgages, in the room and stead of that which was sold to procure it.

The court of appeals has held that a chattel mortgage was not *per se* void because of a provision contained in it, allowing the mortgagor to sell the mortgaged property, but accounting to the mortgagee for the proceeds and applying them to the mortgage debt. *Ford v. Williams*, 24 N. Y. 359; *Conkling v. Shelley, ante*; *Miller v. Lockwood, ante*. These cases were decided upon the ground that such sale and application of proceeds are the normal purpose of a chattel mortgagee, and within the precise boundaries of its lawful operation and effect. Such provision does no more than to substitute the mortgagor as the agent of the mortgagee, to do exactly what the latter had the right to do, and what it was his privilege and his duty to accomplish. It devotes the mortgaged property to the payment of the mortgage debt. A further doctrine held in the case of *Conkling v. Shelley, ante*, that, under such a stipulation, the proceeds realized by the agent are to be deemed realized by the principal, and as against an adverse lien, are to be applied on the mortgage debt even though not actually paid over shows how impossible it is that any fraud, or injury to others, can be imputed to the agreement. In such case, if the mortgagor sells and actually pays over the whole proceeds, that only has happened which is the proper and lawful operation of the mortgage. If, on the other hand, such proceeds are not paid over, they are deemed paid over and applied in reduction of the mortgage debt, though, as between mortgagor and mortgagee, the debt remains, and is still unpaid; and the adverse liens and rights of creditors are thus preserved. The same effect has been given to such a stipulation in the Federal Court, in a case where the whole subject was deemed open and the court at liberty to ascertain the true rule, unhindered by decisions often conflicting and impossible to reconcile. *Robinson v. Elliott*, 22 Wall. 524. The court, while holding that provisions which allowed the mortgagor to sell for his own benefit are necessarily fraudulent, since they strip the mortgage of its whole force as a security to the holder, and make it merely a shield to the debtor, carefully qualified its judgment by adding that such results do not follow where the sales are to be for the benefit of the mortgagee, and their proceeds to be paid over to him.

The case of *Southard v. Benner, ante*, does not question this principle.

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In that case there was no agreement to sell for the benefit of the mortgagee, and apply the proceeds to the debt. The decision went upon the ground that the jury had found, and there was evidence to justify it, that the mortgagor was permitted, by the conscious assent and agreement of the mortgagee, to sell the property as he pleased for his own benefit, precisely as though the mortgagee had no existence.

The stipulation, in *Brackett v. Harvey, ante*, that the mortgagor might sell the property for good business paper which the mortgagee was to take and apply on the debt, was an inference from the provision of the contract by which the mortgagee agreed to accept such paper as cash. It was thus a provision in entire harmony to apply all sales to the mortgage debt. If the sales were for cash that was to be paid over; if on a credit, the paper was to be taken at once as cash. No permission to sell in any other way was given, or can be inferred from the contract, and the consent actually given made the paper taken as cash between the parties, to be at once applied upon the debt. Such a provision cannot be said to affect injuriously the rights of other creditors, and was held in this case, not to render the mortgage fraudulent and void.

The implied permission, in *Brackett v. Harvey, ante*, to use the proceeds for replenishing the stock by substituting in the mortgage the goods bought for those sold, was only necessary in order to bring in after-acquired property upon condition that the substituted property be and become subjected to the mortgage lien. In this sense it provided only for a shifting of the lien from one piece of property to another taken in exchange; it did not permit anything mortgaged to escape the mortgage; if it did not turn into cash or paper, which reduced the mortgage debt, it turned into other property, which became itself the subject of the mortgage lien. *Id.* In this case the court held that such a provision did not vitiate the mortgage.

An agreement between the parties, by the terms of which the mortgagor is permitted to use the proceeds of sale in part to meet the expenses of the business and for the support of his family, made at the time of the written one, but outside of it and by parol, may be proved and serve to establish a fraudulent purpose. *Brackett v. Harvey, ante*; *Southard v. Benner, ante*. And if such an agreement is made it is necessarily fatal, for it opens the door to fraud and permits the mortgagor to use the property for his own benefit, utilizing the mortgage as a shield against other creditors.

Statement of the Case.

CHARLES C. BLAIR, *et al.*, Respondents, v. PATRICK LYNCH,
Appellant.

Court of Appeals, April 19, 1887.

Reversing same case, 35 Hun, 663, Mem.

1. *Limitation of actions. Payment.*—A payment obtained from the debtor through a pressure of an examination in proceedings supplementary to execution and an order of the court, does not stop the running of the statute of limitation, or revive the claim. The efficacy of a payment to avert the effect of the statute as a bar resides in the conscious and voluntary act of the debtor, explainable only as a recognition and confession of the existing liability.
2. *Same. Question for the jury.*—Where two contracts have been proven, upon either of which the payment might have been intended to apply, and upon one or both of which it must have been applied, the question of application, under proper instructions from the court, should have been submitted to the jury; and a direction of a verdict for the plaintiff, in such case, was error.

Action to recover from defendant a balance claimed to be due upon a loan made to him.

The defendant pleaded the statute of limitations, and it was conceded that the statute was a bar unless its effect was averted by payments.

Plaintiffs proved that they, under the direction of defendant, brought suit upon notes given by another party for the loan, obtained judgment, and collected from him, on supplementary proceedings, the sum of \$450; and also that defendant paid to them \$1,800.

Thereafter the following agreement was executed:

“For and in consideration of the sum of \$1,800, this day paid by Patrick Lynch, the receipt of which is hereby acknowledged, we hereby sell and assign one-half of our interest in the above-described bond and mortgage, and

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hereby agree with the said Patrick Lynch to pay over to him one-half of all the moneys hereafter collected upon said bond and mortgage, and said Patrick Lynch is the owner of a one-half interest in the said bond and mortgage, and hereby agrees to pay one-half of all expenses incurred in the collection of the same.

“BLAIR & TRUESDELL.

“SYRACUSE, *November 25, 1878.*”

The court directed a verdict for the plaintiff and defendant excepted.

Louis Marshall, for appellant.

Forbes, Brown & Tracy, for respondents.

FINCH, J.—If we assume that the learned trial judge correctly decided that the plaintiffs' evidence was sufficient to establish the contract pleaded beyond any necessity for submitting that question to the jury, because there was no direct contradiction of the witnesses, and the circumstances tending to raise doubt or suspicion were more than balanced by the silence of the defendant, who might have made an effectual denial,—an assumption not above criticism, and as to which we do not all agree,—there yet remains a material question which, if not decided in favor of the defendant, should at least have been submitted to the jury.

The statute of limitations was pleaded as a defense, and confessedly barred the right of recovery unless the debt was revived by a payment upon it. So far as such payment is sought to be deduced from the collection by plaintiffs of the sums obtained from John O. S. Lynch through the pressure of an examination and an order of the court, it is quite clear that the effort must fail. The efficacy of a payment to avert the effect of the statute as a bar resides in the conscious and voluntary act of a debtor, explainable only as a recognition and confession of the existing liability.

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But here there was no act of the defendant. He paid nothing to the plaintiffs. The man who did pay was not his agent, or acting, or authorized to act, in his behalf. The payment which he made was on his own debt to plaintiffs, and not on defendant's contract with them. The very existence of that contract was unknown to him, and the fact of his payments unknown to defendant until after they were made. The debtor paying did so by compulsion, and not in obedience to any direction or request of the defendant. The money paid never belonged to the latter, but passed from the ownership of John O. S. Lynch to that of the plaintiffs. Its transfer was in no respect the act of the defendant, and could serve to indicate no purpose or intention of his. One must go outside of the act, and busy himself with spoken words and debatable inferences, changing its inherent and obvious character before it can be connected with the defendant, and then it amounts only to a direction that plaintiffs should collect from their debtor a sum due to them, and, when that remedy was exhausted, a promise that the defendant would take the security and pay the balance remaining. If those payments operated to reduce the defendant's liability, it was not through any act or agency of his, and their existence indicates absolutely nothing as a recognition or admission on his part. They were entirely consistent with a denial by him of any liability whatever, and with an utter repudiation of the alleged contract. They might equally have been made if plaintiffs had held the claim in their own right, having no recourse against the defendant, and so open to a complete explanation in no manner dependent upon any purpose or intention of his. We should infringe a very wise and valuable rule of evidence if we gave to the act of John O. S. Lynch a constructive effect amounting to recognition of a contract by the defendant, the existence of which he could nevertheless consistently dispute.

The other payment relied upon was that of \$1,800, in

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exchange for which the plaintiffs executed and delivered to the defendant an assignment of one-half of the ~~Slattery~~ mortgage. The consideration for this payment was expressed in writing by the parties concerned; and the terms of that instrument, so far from purporting a payment upon the contract pleaded, are on their face, and without explanation, inconsistent with the existence of that contract. The writing expresses that the payment was made upon a contract of purchase, and in full discharge of that contract. It not only fails to admit that something more might be due or become due, but negatives any such inference. It speaks of the mortgage as being the property of the plaintiffs, and involves the concession that only one-half of it became the property of the defendant, and that by a purchase then and there made. Stopping with the written paper, the conclusion is irresistible that the \$1,800 was paid upon a contract of purchase made at its date, and not upon a broader one already existing. But the plaintiffs offer an explanation. Having proved a previous agreement, by the terms of which they were to obtain the mortgage for defendant, and hold and enforce the legal title for his benefit, looking to him for direction and for the reimbursement of their unpaid advances, they further testify that the \$1,800 was one-half of the \$3,600 which that contract called for, and that after such payment they demanded of defendant the balance remaining due, which he promised to pay. They then argue that the assignment made was a transfer of the legal title *pro tanto* for the protection of the defendant, and that both the assignment and the payment made were consistent with the contract of agency alleged, and were steps in furtherance and in execution of that principal contract. By that process they seek to show that the payment of \$1,800 was made and accepted upon the contract pleaded.

The question is not without its difficulties. It cannot be decided in favor of plaintiffs as a pure question of law.

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The most that they can reasonably claim is that it raised question of fact, or a mixed question of law and fact. Adhering to the assumption upon which our reasoning has been founded, that the contract of agency was proved beyond contradiction, and to be taken as a conceded fact, we have a case in which two contracts have been proved, upon either of which the \$1,800 might have been intended to apply, and upon one or both of which it must have been applied. The writing indicates one application; the conversations another. It does not solve this difficulty, to say that the assignment was but an incident in the execution of the principal contract, for the defendant may have intended not to recognize or admit it by a payment upon it, and for that very reason have made a special contract of purchase, upon which alone his money should be applied, and which only he would recognize. The facts proved admit of conflicting inferences; and it seems to us, therefore, that the question whether the payment made in form upon the contract of purchase was also made and accepted upon the contract of agency within the intent of the parties was a question which, under proper directions from the court, should have been submitted to the jury. The defendant asked to go to the jury upon all the evidence in the case as to such matters as the court should direct, but the request was refused; the court holding that there were no questions of fact, and directing a verdict for plaintiffs. To this there was an exception, which we think points out error.

The judgment should be reversed, and a new trial granted; costs to abide the event.

All concur, except RUGER, C. J., not sitting.

WILLIAM F. BRIDGE, Appellant, v. GEORGE F. PENNIMAN,
Respondent.

Court of Appeals, April 19, 1887.

Affirming 51 N. Y. Super. Ct. 183.

Appeal.—Where the possible questions of law are inextricably involved in, and dependent upon, the conclusions of fact found by the referee upon conflicting evidence, the judgment of the general term sustaining his decision will be affirmed on appeal to the court of appeals.

Action to recover back the purchase money paid for certain shares of stock, on the ground that said purchase was induced by false representations on the part of defendant.

Appeal from a judgment of the general term of the New York Superior Court, affirming judgment entered on report of referee, dismissing complaint.

William C. Holbrook, for appellant.

Joseph H. Choate, for respondent.

FINCH, J.—That the plaintiff was induced to buy and pay for the stock of the oil company by representations of the defendant which were untruthful and incorrect, and so, upon a discovery of the facts, was at liberty to rescind the contract, and recover back the purchase money, is scarcely disputed on this appeal, and may be assumed without discussion.

The real controversy revolves about the inquiry whether the plaintiff did in fact rescind by tendering back, without conditions, the stock received; or whether, on the contrary, he used that stock, and its transfer to the defendant, as a new consideration for a new contract, by which he obtained

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from the defendant a bond of indemnity with the protection of a surety added, against the liabilities to which he had become exposed by his official connection with the company. This appears to us to be a question of fact. The history of the transaction, as detailed by the adverse parties, runs upon different lines, and is colored by their respective theories. As a consequence, there is, to some extent, disagreement and contradiction between them; and where the facts themselves are not disputed, the inferences derivable from them as to the real nature of the transaction, and the true intent and understanding of the parties, are extremely divergent, and open to wide differences of opinion.

The plaintiff's theory is that, when the worthless character of the stock was fully ascertained, the defendant promised to protect his vendee from loss; that the latter tendered back the stock, and demanded the purchase money as a clear rescission of the contract; and that the indemnity given stood outside of that rescission, and rested independently upon the duty and liability of the defendant to indemnify, and upon his express promise so to do. This theory has been assailed with the criticism that the plaintiff transferred, not only the stock bought of defendant, but that purchased of other parties; and received from defendant a bond of indemnity which could not have been compelled, and which he was not bound to give, either by virtue of his general duty, or of any promise which he had made. It is argued, from the terms of the correspondence which passed between the parties, that the plaintiff steadily demanded the protection of a surety—the liability of some third person which would supplement that of the defendant—and so was seeking to obtain what he had no right to demand, and could not have compelled, and which, therefore, he chose to buy by a transfer of all the stock which he owned.

The theory of the defendant is that the arrangement was

made in that way ; that the plaintiff, by becoming the president of and a director in the oil company, stood exposed to a heavy and dangerous liability for its debts, in case of disaster, and above and beyond the total loss of his stock ; that he realized and conceded that he had not been willfully or purposely deceived ; and so concluded, as the wisest treatment of the misfortune, to lose his stock in exchange for adequate protection against threatened and further loss in addition. Attention is directed to a letter written by the defendant which it is claimed offered to plaintiff a choice of alternatives, and meant, in substance, that in the emergency the defendant would give to the plaintiff all his stock, if the latter would assume the risk of the corporate success or failure, and leave the defendant's loss measured only by the stock thus transferred ; or, on the other hand, if the plaintiff chose to give his stock to defendant, he might end his loss at that point, and the defendant would protect him by adequate security against any further injury. The letter is capable of such interpretation, and it is said presented to plaintiff's mind a choice of alternatives, one of which he adopted, and which fully explains and accounts for the transfer made and the bond given in return.

It seems to us apparent that the question thus raised depends almost wholly upon the view taken of the facts, and of the conflicting inferences which they originate. The referee has found as a fact that the plaintiff did not make an unconditional tender of his stock, but used it as his own, with which to purchase the indemnity received ; and refused to find in accordance with plaintiff's theory and version of what occurred. There are facts and inferences in the case from which that conclusion could fairly be drawn, although open to a doubt which manifested itself when the general term affirmed the judgment, by the dissent of one member of the court. The possible questions of law in the cases are inextricably involved in and dependent upon the conclusions of fact ; and accepting them as found by the referee, and

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approved by the general term, it is clear that there was no rescission, but a new contract agreed upon and executed. The judgment should be affirmed, with costs.

All concur.

FLORIAN FLECKENSTEIN, Respondent, v. THE DRY DOCK,
EAST BROADWAY AND BATTERY RAILROAD COMPANY,
Appellant.

Court of Appeals, April 19, 1887.

Negligence. Right of way.—A street railway has not the exclusive, but simply the paramount, right to the use of its tracks; and though a person, lawfully driving upon the same tracks, must not recklessly, carelessly or willfully obstruct the passage of its cars, he is not absolutely bound to keep off, or get off, from the tracks; if he fairly and in a reasonable manner respects the paramount right of the company, and, without any fault on his part, is injured by carelessness or fault chargeable to the railway, the law affords him a remedy by action for damages.

Action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered on a verdict for plaintiff.

Edmund Randolph, for defendant and appellant.

Stephen B. Jacobs, for plaintiff.

EARL, J.—The evidence of the plaintiff tended to show that, while he was engaged in trying to remove his team and wagon from the track of defendant's road, one of its drivers carelessly drove one of its cars against him, and caused the injury of which he complains. This evidence was controverted on the part of the defendant, and hence

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there was a question of fact for the jury, and their decision thereon is not reviewable here.

The trial judge did not err in charging the jury that the defendant did not have the exclusive right to the use of its tracks, but simply the paramount right. Street railways have the lawful right to put their tracks in streets, and run their cars thereon. Their cars are confined to the tracks, and cannot turn out to avoid obstacles thereon. Hence they have the right of way, and persons lawfully driving upon the same tracks must not recklessly, carelessly or willfully obstruct the passage of their cars. But such persons are not absolutely bound to keep off or get off from the tracks. They must fairly and in a reasonable manner respect the paramount right of a street railway; and if they do this, and without any fault on their part they are injured by carelessness or fault chargeable to the railway, the law affords them a remedy by action for damages.

The judgment should be affirmed.

All concur.

THE LONG ISLAND BANK, Respondent, v. GEORGE
A. BOYNTON, Appellant.

Court of Appeals, April 19, 1887.

Pleadings. Usury.—An usurious agreement must be proved as laid, and whoever desires the aid of the statutes against usury, through the interposition of the court, must make out his right to relief by allegations as well as proof.

Darlington, for defendant and appellant.

Van Orden, for respondent.

DANFORTH, J.—The action was by the plaintiff as indorsee for value, against Boynton as maker and first in-

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dorser of a promissory note payable to his own order, and one Tuttle as second indorser. The complaint alleged the indorsement and delivery of the note by Boynton to Tuttle, and its indorsement and delivery by Tuttle to the plaintiff. The defendant, Boynton, by his answer, put in issue these facts. The burden of proving them was of course on the plaintiff, and the trial court did not err in refusing to give the defendant the affirmative. He, also, set up that the note in suit had its inception in a corrupt and usurious contract with one F. for a loan of money for which F. was to receive eight per cent per annum, besides a commission of one-fourth per cent on the face of the note. The evidence gave no color for the defendant's contention on this point, and the proof offered by him was of a contract totally different from that stated in the answer. Such was even the defendant's position on the trial; but, to show that the plaintiff was not surprised at the variance, he offered in evidence papers on which he had on some former occasion unsuccessfully moved at special term for leave to serve a new answer, conforming to the proof now offered, but in no respect like the present pleading. The usurious contract must be proved as laid, and it was not error to hold that an admission that it has not been and could not be so proved has no tendency to defeat a cause of action which came to the plaintiff for full value, and without notice of any defect.

The appellant cites *Tyng v. Commercial Warehouse Co.* (58 N. Y. 308), as against the ruling of the trial court; but in that case no question was made upon the trial as to the sufficiency of the pleadings, or the relevancy of the proofs, and it was held that it was within neither the authority nor the duty of an appellate court to deprive the successful party of his recovery on the grounds of incompleteness or imperfection of his pleadings. In the case before us, not only was the objection taken on the trial, but the trial judge, to overcome it, was required to disregard the decis-

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ion of the special and general terms, and grant indirectly a favor which those courts had upon formal application denied. The statute against usury is, like other statutes, to be obeyed; but whoever desires its aid through the interference of a court must make out his title to relief by allegations as well as proof. This the defendant failed to do.

The judgment should be affirmed.

All concur.

HENRY TOZER, an Infant, by Guardian, etc., Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Court of Appeals, April 26, 1887.

See 6 N. Y. St. Rep. 447.

Appeal. General objection.—A general objection to evidence is sufficient, where the grounds of the objection cannot be misunderstood, and if they had been specified, the objection cannot be obviated.

George C. Greene, for appellant.

Myron H. Peck, Jr., for respondent.

PER CURIAM.—In deciding upon the appeal in this case, it did not escape our attention that the objections to the admission of the evidence which we held to be incompetent were general. That point was discussed in consultation, but we considered that the evidence was in its nature inadmissible, as it related to speculative and conjectural possible future consequences which might be apprehended from the injury, and how long after the injury such consequences might be developed. The course of the examination shows that the ground of the objections could not have

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been misunderstood, and, if it had been specified, the objection could not have been obviated.

Motion denied, with costs.

All concur.

LE DELTA A. BOSTWICK, Respondent, v. EMILY P. BEACH *et al.*, Appellants.

Court of Appeals, April 26, 1887.

Specific performance. Interest.—Where specific performance is decreed, the court will, so far as possible, place the parties in the same situation in which they would have been if the contract had been performed at the time agreed upon. The vendor is regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the unpaid purchase money, and charged with interest thereon, unless the purchase money has been appropriated, and no benefit has accrued from it to the purchaser.

2. *Same. Deterioration of land.*—The vendor is chargeable, in such case, with the damages caused by deterioration of the property through his mismanagement and neglect.

Action to enforce specific performance against defendants, as executors, upon a contract for the sale of land, made under a power in testator's will. It is reported in 103 N. Y. 414. Application to amend the remittitur in this action.

Milton A. Fowler, for appellants.

O. D. M. Baker, for respondent.

RAPALLO, J.—When this case was before us on the appeal from the interlocutory judgment, it appeared from the findings that the unpaid portion of the purchase money (\$10,500) had been tendered to the executors on the first of March, 1882, and that, on their refusal to accept the same, and deliver the deed, that sum had been deposited by the

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plaintiff in the First National Bank of Lowville to the credit of the executors, to be paid to them on the delivery of the deed. There was nothing to show that after that deposit the plaintiff had derived any benefit from the use of the fund, and presumptively it had lain idle and unproductive. Therefore the purchaser was not charged with interest on the purchase money.

It is now shown, by affidavits, that, shortly after this deposit, the fund was wholly or in part withdrawn from the bank by the plaintiff, and we are now asked to add to the modifications directed in the opinion, a further provision charging the plaintiff with interest on the amount so withdrawn. If the fact had appeared in the case when before us on appeal, this modification would doubtless have been proper, and even now we might find means to make it, if no other facts were shown on the part of the plaintiff raising a counter equity. But, in opposition to the application of the defendants, the plaintiff presents affidavits showing that during the pendency of this action, in consequence of neglect and mismanagement on the part of the defendants, the ditches on the premises have been allowed to be filled up, the buildings to become dilapidated, the water-works to go to decay, the fences to be destroyed, and the value of the property to be thus depreciated to an amount exceeding the interest on the unpaid purchase money. If these facts had appeared, they undoubtedly would have influenced our judgment in respect to allowing interest upon the purchase money, or making some other provision for compensating the plaintiff for the damages alleged to have been sustained. Where specific performance is decreed, the court will, so far as possible, place the parties in the same situation they would have been if the contract had been performed at the time agreed upon, and by the application of the rule of courts of equity, by which things which ought to have been done are considered as having been done at the proper time, the vendor is regarded as trustee of the land for the

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benefit of the purchaser, and liable to account to him for the rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the purchase money unpaid, and charged with interest thereon, unless the purchase money has been appropriated, and no benefit has accrued from it to the purchaser.

But this is not the only manner which the court has adopted to adjust the equities of the parties. For instance, where the subject of the purchase was a leasehold estate in a mill, and the delay of performance of the contract was attributable to the vendor for his failure to show good right to assign his lease, and dilapidations had occurred, he was charged with the expenses of repairs required to put the mill in tenantable condition, and of those which had been incurred for keeping up the machinery until the purchaser could prudently take possession. And in *Ferguson v. Tadmán* (1 Sim. 530), where the estate had deteriorated in value by reason of mismanagement and neglect, during five years which elapsed between the filing of the bill for specific performance and the decree, the amount of the deterioration, with interest, was ascertained, and allowed to the plaintiff out of the purchase money which had been paid into court. In *Worrall v. Munn* (38 N. Y. 137), these principles were recognized; and the vendee, having obtained a decree for specific performance, was allowed the damages sustained, during the pendency of the suit, by deterioration from waste committed by the defendant during the pendency of the suit.

If the matter should now be opened for the purpose of letting the defendants in to claim interest on the purchase-money, it would be no more than just that the same indulgence should be extended to the plaintiff, to let him in to prove the damages he claims by reason of deteriorations, caused by mismanagement and neglect. These points appear to be the only ones as to which the parties have been unable to agree, in settling the form of the judgment.

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From the affidavits presented, it would seem that the damages claimed by the plaintiff would about equal the interest claimed by the defendants; but if the judgment below is modified so as to admit the allowance of interest, it should also be modified so as to admit proof of the damages claimed. If the statements in the affidavits are correct, justice would apparently be done by leaving the matter as it is, and confining the modifications of the interlocutory judgment to those directed in the original opinion of this court, which appear to be substantially contained in the modified judgment as proposed on the part of the plaintiff. The details, however, are subject to settlement in the supreme court. But if the defendants desire to insist upon their claim to be allowed interest, and to contest the amount of damages resulting from deterioration and mismanagement, the modified judgment should contain provisions referring it to the referee to ascertain what amount of the sum deposited in the bank was withdrawn by the plaintiff, or subject to his control, and for what length of time, and charging him with interest thereon during that time. The amount of deterioration of the property, by reason of mismanagement and neglect, between the 1st of March, 1882, and the time of plaintiff's obtaining possession, should also be ascertained and charged, either to the defendants, as executors, or to the defendant Emily P. Beach, as the equities may appear. She certainly has no reason to complain of any loss she may sustain through this litigation, as it appears to have been caused by her persistent refusal to carry out the contract, which, according to the findings of fact, was intelligently entered into by her, and was a fair contract for the full value of the farm, and was beneficial to all concerned in the estate. By this unjustifiable refusal on her part, all parties have been subjected to damages, and there is no reason why the loss should fall upon the plaintiff, who seems to have been always ready to perform his part of the contract.

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It is to be hoped that, upon the principles here indicated, the counsel for the respective parties may be able to agree upon the form of judgment to be entered. Otherwise it may be settled by the supreme court, and the interlocutory judgment may be modified so as to provide for the ascertainment and allowance of the interest claimed by the defendants, and also of the damages claimed by the plaintiff, at the election of the defendants. If the defendant shall not consent to have the damages ascertained and allowed, the application for the allowance of interest is denied.

All concur.

TRUMAN SYMSON, Appellant, v. HANNIBAL SELHEIMER *et al.*,
Respondents.

Court of Appeals. April 26, 1887.

See 40 Hun, 116.

1. *Amendment. Judgment.*—The plaintiff has no legal right to demand from the court permission to amend the statement of the confession of judgment, but such amendment is one which the court may in its discretion refuse, or grant upon such terms as to it may seem to be just.
2. *Same. Terms.*—The special term, on granting such motion, may not annex to the amendment a provision which absolutely postpones the lien of the judgment, but may impose such postponement as a condition of granting the motion, giving the plaintiff the option of accepting the favor upon the condition imposed, or of not taking it and leaving his judgment in its original state.
3. *Same. Power of court of appeals.*—The court of appeals, in such case has no power to amend its remittitur by putting in some other condition than that imposed by the supreme court. To do so would be an exercise of the former court's, and a review of the latter court's, discretion.
4. *Same. Effect of order.*—The order as modified, if plaintiff accepts the conditions, cannot, it seems, be construed to postpone plaintiff's judgment to the lien of a judgment docketed in form, but which is, as matter of law, void.

Motion to amend the remittitur.

Opinion, *PER CURIAM*.

Nathaniel Foote, for appellant.

John H. White, for respondents.

PER CURIAM.—The motion made by plaintiff at special term, to obtain permission of the court to amend the statement of the confession of judgment, was addressed to the discretion of the supreme court. It was not an amendment which he had the legal right to demand, but was one which it might, in its discretion, refuse, or grant upon such terms as to it might seem to be just. *Mitchell v. Van Buren*, 27 N. Y. 300. The special term granted the motion to amend unconditionally.

Upon appeal, the general term, while affirming that part of the order of the special term granting leave to amend, coupled it with a provision absolutely postponing the lien of the plaintiff's judgment, as stated in such order. The effect was that, upon a motion for leave to amend his judgment, the plaintiff found that his motion had been granted, and the lien of his judgment absolutely postponed; instead of which, as he was asking for a favor, the order should have been in the form of granting the favor upon condition of his assenting to the postponement of his lien; thus giving the option to him of taking his favor upon the condition imposed, or of not taking it, and leaving his judgment in its original state. This court thought that the plaintiff had a right to have this option granted him. We, therefore, modified the order of the general term in the manner set forth in the remittitur.

The present motion to amend the remittitur, by putting in some other condition than that imposed by the supreme court, is to appeal from the discretion exercised by that court, and to ask us to exercise our own, which we have no power to do. We think, however, that the order as modified by this court, in case plaintiff accepts the conditions, cannot be construed to postpone the plaintiff's judgment to the lien of a judgment docketed in form, but which

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is, as a matter of law, void. Where is the lien of a void judgment, or how can it be said to be a judgment at all?

The motion to amend the remittatur must be denied, without costs.

All concur.

WELLS, FARGO & COMPANY, Respondent, v. ERWIN DAVIS,
Appellant.

Court of Appeals, May 10, 1887.

Modifying same case, 34 Hun, 628, Mem.

1. *Appeal. Objection not raised below.*—An objection, which could be obviated if made in time, cannot prevail when taken for the first time in an appellate court.
2. *Judgment. Interest.*—In an action brought in this state upon a judgment obtained in another state, the interest allowed is that of the *lex fori*; and a provision in the judgment sued on, allowing interest at the rate of ten per cent, does not control.

Action upon a judgment of the district court of the third judicial district of the territory of Utah.

Appeal from a judgment of the general term of the supreme court.

This action was brought on a judgment recovered in the district court for the third judicial district of Utah territory, against Erwin Davis and John N. H. Patrick for \$7,462.88, with interest thereon at the rate of of ten per cent per annum, from the date thereof, till paid, with forty-nine dollars costs and disbursements. Patrick was not served with the summons in this action. The court in this action directed a verdict for plaintiff for the amount of the alleged judgment, with interest at ten per cent from the date of recovery.

Henry A. Root, for appellant.

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Wm. Bro. Smith, for respondent.

DANFORTH, J.—There are two questions in this case :

First. Whether the paper purporting to be a copy of a judgment roll of the district court of the third judicial district of the territory of Utah was properly exemplified ; and, if so, then,

Second. Whether the plaintiff was entitled in this action to recover interest at the rate of ten per cent upon the sum adjudged thereby to be due.

1. The act of congress (Rev. St. U. S., § 905) requires that the "records and judicial proceedings of the courts of any state or territory shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief-justice, or presiding magistrate that the said attestation is in due form." These forms seem to have been strictly complied with. After the exemplification of the record under the seal of the court comes first the attestation of a judge described as "judge of the district court of the third judicial district, territory of Utah ;" that the exemplification referred to is in due form of law ; that O. J. Averell, whose name is subscribed thereto, was at its date clerk of that court ; and that the signature of his name is genuine. After that is the certificate of Averell, described as clerk of the court referred to ; that its records are in his custody as such officer ; that the foregoing is a copy of so much of said records as constitutes the judgment record in said cause ; that he has compared the same with the original ; and that the same is a correct transcript therefrom and the whole of such original. To this is affixed, as he certifies, his official seal. We have therefore a copy of the entire record, the attestation of the clerk, the seal of the court, and the certificate of an officer described as "judge" of the court in which the judgment disclosed by the record appears to have been rendered.

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The appellant's objection at this point is that the certificate does not show that the person making it was either "sole judge, chief-justice, or presiding magistrate of the court;" nor that, at the time of making it, the court from which it purports to come, was composed of one judge only, and that the person making the certificate was that judge. If this objection had been presented to the trial court and there insisted upon, it would be necessary to consider whether, in view of the decisions of other courts, cited by the learned counsel for the appellant, it would not be ground of error. But it was not there pointed out.

The objections to the admission of the copy of the judgment were of a different character. It was assumed by the defendant that the provisions of the laws of the United States applied to the case; but it was said (1) that no evidence had been offered of the organization of the court "which rendered it" as a territorial court of Utah, and that the judgment does not prove the organization of that court; (2) that the certificate of the clerk does not certify that the judge whose signature is attached to the certificate was a judge of the district court of Utah, and that the exemplification is not a proper one.

In *Burnell v. Weld* (76 N. Y. 103), to which the appellant calls our attention, it appeared that the copy of the record offered in evidence was objected to upon the trial upon the ground that "it was not properly exemplified, as required by the act of congress, in that there was no certificate of the chief-justice," and we were constrained to sustain an appeal from the ruling of the court below because the defect was specifically pointed out at the time its admission was objected to. It was not so in the case at bar. Had it been, other evidence might have been offered. An objection which could be obviated if made in time cannot prevail when taken for the first time in an appellate court. The same remarks apply to the point now made also for the first time, that the seal to the attestation clause was put directly

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upon the paper, whereas it is urged it should have been impressed upon wax or other adhesive substance. Without reference, however, to the laws of the United States (*supra*), we think the record was properly certified under the provisions of the laws of this state, and so admissible in evidence.

But we think the court erred in allowing interest upon the cause of action at the rate of ten per cent per annum. The judgment sued upon was entered in October, 1877, upon a verdict of \$7,462.88, and the record recites "that, by virtue of the law and the premises aforesaid"—the proceedings in the action—"it is ordered and adjudged that said plaintiff have and recover from said defendants the sum of seven thousand four hundred and sixty-two and 83-100 dollars, with interest thereon at the rate of ten per cent per annum from the date hereof till paid." Upon the trial the plaintiff's counsel proved, against objection and exception by the defendant, that, under the laws of Utah relating to the subject, it was lawful to take ten per cent interest per annum, when the amount of interest has not been specified or agreed upon, and computed interest upon the recovery from its date at ten per cent per annum, making, at that rate, the sum due upon the judgment of principal and interest, \$12,063.88. This sum the court held the plaintiff was entitled to recover, and the defendant by proper exceptions to this ruling, and exceptions to the refusal of the court to charge otherwise, has fairly raised the proposition upon which he asks a modification of the judgment which followed this ruling. We think his contention must prevail under the rule already declared by this court, that interest is given upon a judgment, not on the principle of implied contract, but as damages for delay in performing the obligation.

In *Taylor v. Wing* (84 N. Y. 471) the mortgage in terms called for interest "at seven per cent until paid," and by the judgment interest at the same rate was directed to be

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paid on the amount found due from the date of the decision. Upon appeal this was held to be wrong, and that after judgment the mortgage was merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgage, but of the judgment, and that the interest should have been at the lawful rate, i. e., six per cent. To the same effect was *Salter v. Railroad Co.* (86 N. Y. 401).

In *Prouty v. Lake Shore and M. S. Railway Co.* (95 N. Y. 667), the judgment before the court was by its terms payable with interest.

In *O'Brien v. Young* (95 N. Y., 428), that provision was lacking, but each judgment was recovered when the statutory rate of interest was seven per cent, and as to each it was held that the amount of interest to be collected on execution must be governed by statute, and that the rate changed when the general law reduced that rate to six per cent. Laws 1879, chap. 538. The fact that one judgment specifically provided for the payment of interest was not supposed to create any distinction in the application of the law regulating that question. The law of the state made every judgment interest bearing, and the obligation for its payment was not increased or varied by inserting a direction to that effect in the record. The provision in the judgment of Utah, therefore, in regard to interest, is of no more force in regulating the rate of interest upon suit brought in this state than is the statute of that territory which justified its court in allowing it. As the increase is allowed, not as interest, but as damages, its measure must be that of the state where the action for its recovery is brought. The *lex fori* governs. This is the necessary result of the decisions in this court already referred to, and the same doctrine, as to similar cases, prevails in the courts of Massachusetts. *Clark v. Child*, 136 Mass. 344.

The respondent relies, as against this position, upon an expression in one of the opinions in the *O'Brien Case*

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(*supra*), to the effect that when a judgment requires a specified rate of interest to be paid, the rate specified becomes a part of the obligation to be discharged. That was said in reviewing *Prouty v. Lake Shore and M. S. Railway Co.* (*supra*)—a decision in equity which provided for a specific performance of a contract between parties in respect to certain dividends in arrear directed to be paid, “with interest thereon from the entry of judgment until the same shall have been fully paid and satisfied.” The clause was held to be insufficient to justify the collection of interest at seven per cent after the act of 1879, although the judgment was recovered before that time; and the remark quoted was by way of argument merely, not essential to a disposition of any question upon which the case finally turned, nor to the conclusion that interest upon a judgment was allowable by way of penalty or damages for default. Concerning it, neither the law of Utah nor the judgment can have extra-territorial force. It seems to me, therefore, that the interest to be allowed as damages in this case should be governed by the law in force in this state at the time of the trial (Laws 1879, chap. 538), viz., six per cent; but a majority of the court are of opinion that the plaintiff may properly recover seven per cent interest from the time of the rendition of the judgment in Utah until the act of 1879 (*supra*) took effect, and from that time at the rate of six per cent.

The judgment should, therefore, be modified by deducting the difference between these rates for the times specified, and interest at ten per cent, and, as so modified, affirmed, without costs in this court.

All concur, except EARL and FINCH, JJ., who vote for general affirmance.

**JULIUS POLLOCK, Respondent, v. GOUVENEUR MORRIS,
Appellant.**

Court of Appeals, May 13, 1887.

Affirming same case, 51 N. Y. Super. 112.

1. *Appeal. Findings.*—Where there are no exceptions to the findings of fact or conclusions of law contained in the record, and none to the refusals to find requested on behalf of the appellant, the court of appeals has nothing to review but exceptions taken on the trial.
2. *Jurisdiction. Superior Court.*—The provision of section 993 of chap. 410 of Laws of 1882, that when no ownership is named in the report of the commissioners, or the owners named cannot be found, it shall be lawful for the city to pay the award into the said supreme court, to be disposed of by it, it is for the city's benefit, which it may adopt and plead as a defense, but to which it is not compelled to resort. The city may not adopt such a course, but may bring the money into the court, in which it is sued, and the superior court of the city of New York in such case has jurisdiction.
3. *Evidence. Exclusion.* A question, calling for an inference or opinion of the witness, founded upon facts either undisclosed or insufficient to warrant the conclusion sought, is properly excluded.

Appeal from the general term of the New York superior court, affirming judgment of trial term in favor of plaintiff.

W. S. Smith, for appellant.

J. R. Marvin for respondent.

FINCH, J.—There are no exceptions to the findings of fact or conclusions of law contained in this record, and none to the refusals to find requests on behalf of the defendant. There is nothing subject to our review beyond an exception taken to the jurisdiction of the court, and one to the exclusion of a question during the progress of the trial. The action was brought in the superior court of the city of New

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York to recover an award for land taken in the opening of a street, and the city was the original defendant. A claim to the award was also made by Morris, and an order of interpleader granted and entered, substituting him as defendant, and discharging the city upon its paying into the hands of the chamberlain, to the credit of the action, the amount of the award.

The jurisdiction of the court was assailed upon the basis of a single provision of the statute. Laws 1882, chapter 410, § 993. The enactment is that when no ownership is named in the report of the commissioners, or the owners named cannot be found, "it shall be lawful" for the city to pay the award "into the said supreme court" to be disposed of by it. This is a provision for the city's benefit which it may adopt and plead as a defense, but to which it is not compelled to resort. It did not adopt it in the present case, and made no such defense, but, admitting its liability to the true owner, brought the money into the court, in which it was sued, and left it there to the credit of the action. That such action could be maintained for the award, we have heretofore decided. *Fisher v. The Mayor*, 57 N. Y. 344; *Spears v. The Mayor*, 87 id. 359.

The question excluded called for an inference or opinion of the witness, founded upon facts either undisclosed or insufficient to warrant the conclusion sought. The inquiry whether all persons who obtained deeds from Morris did so because they were members of the land-owners' association involved an interest derived from the character of that association, and Morris's relation to it, and the possibility of his conveyance outside of its control—matters which depended upon the force of the written contract, and as to which the judgment or inference of the witness was inadmissible. The effort was to derive from that inference another, that Hyde, when he took his deed from Morris, must have been a member of the association, and then from that a third, that he knew of the contract, and so was affected by it. The witness did

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not even know that Hyde was a member of the association, or that Morris had conveyed to him, and his inference, from or reasoning upon the facts was properly rejected.

The judgment should be affirmed, with costs.

All concur.

JAMES F. MOONEY, Respondent, v. JOHN LOUGHLIN, Appellant.

Court of Appeals, May 13, 1887.

Appeal. Findings of referee conclusive.—Where there is any conflict in the evidence in regard to the matters in issue, the findings of a referee approved by the general term are conclusive upon the court of appeals. This is sufficient to deprive the latter court of jurisdiction to weigh the evidence.

Appeal from a judgment of the general term of the supreme court, affirming judgment entered upon report of referee.

Roger A. Prior, for appellant.

D. G. Harriman, for respondent.

DANFORTH, J.—On the 24th of February, 1882, the defendant of the first part, and Fickett & Co., of the second part, entered into an agreement by which Fickett & Co. undertook to do certain work upon St. Mary's hospital, in accordance with drawings and specifications made by one Keeley, an architect, and to finish the same to his satisfaction and under his direction. The plaintiff is not a party to that contract, but it is conceded that he did work and furnished materials necessary for the completion of the building, to the amount of \$571.76. Not being paid he sued the defendant, alleging that the work was done and the materials furnished for the defendant and for his benefit.

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The defendant answered, denying that he, either himself or by any authorized agent, employed the plaintiff to do the work.

Upon the pleadings, therefore, the only issue was as to the liability of the defendant to pay for work and materials, the benefit of which, according to the pleadings, he enjoys.

The issue was referred to a referee, and he, after hearing the evidence, at the defendant's request, found: *first*, that the plaintiff did the work under the instructions of P. C. Keeley; *second*, that Keeley was the architect of the hospital. He also found that Keeley acted as agent of the defendant, and further found that the defendant subsequently ratified the action of Keeley, accepted and is now using and enjoying the benefits of the plaintiff's work and materials. He found the value, as above stated.

Upon appeal to the general term the judgment entered upon the report of the referee was affirmed and, from the decision then made, this appeal is taken.

The learned counsel for the appellant contends in the first place that there was no evidence of authority in Keeley to contract with the plaintiff for the work in suit; second, that the defendant never ratified the appointment by Keeley; and, lastly, that the judgment is wrong because of the admission by the referee of improper evidence, without which the plaintiff's case was not made out; in other words, that the evidence was insufficient to charge the defendant with liability for the plaintiff's claim. He concedes that, if there is any conflict in the evidence in regard to the matters in issue, the findings of the referee and the decision of the general term would be conclusive upon this court, and fatal to his appeal.

The only question then is as to the evidence presented by the parties.

That Keeley was the architect and superintendent of the construction of the building referred to is established beyond question. One of the firm of Fickett & Co. testified

that the plaintiff was employed to do all the painting on the hospital that they had agreed to do under the contract, but that the work in question was outside the contract and not included in it.

The plaintiff testified that, after completing the work now in question, he presented his bill to the defendant, who looked at it and asked him, "What appeared to be the trouble? Was not the work done?" Plaintiff said: "It was," and the defendant said: "You know I know nothing about this work. Mr. Keeley looks after all this work for me, and I cannot pay this bill." Plaintiff said: "Why, Bishop; is not Mr. Keeley your agent?" He said: "He is, and therefore I cannot pay you without his signature to your bill; I will see Mr. Keeley and let you know shortly. Please call again." Plaintiff did so, and defendant examined the bill, and asked who ordered the work to be done? and then said: "This should be left to arbitration." "He asked me to leave the bill with him, and I did so." He objected to no part of the bill." The defendant subsequently told the plaintiff: "Mr. Keeley says he never ordered you to do any work. The defendant then advised plaintiff to see Mr. Keeley again.

The plaintiff further testified that the work was done in pursuance of directions received by him from Mr. Keeley; and, further, that he told Keeley that the things required were extra; and Keeley told him, "They will have to be looked after and taken care of. You make them the same as the rest of the work."

Upon cross-examination by the defendant, he not only reiterated the testimony before giving as to directions received from Keeley, but, being asked as to the authority he understood Mr. Keeley to have, answered, "I understood he had entire authority to do more or less work, or have me do anything he saw fit;" and also, "I consider Mr. Keeley's orders as completely binding on the defendant."

Further, in answer to the counsel for the defendant, he

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said : "I understood he was defendant's agent, for all purposes, on that building."

The defendant was examined as a witness and proved that Keeley was the architect of the hospital. He denied that Keeley had any authority to act for him outside of the contract, and that, personally, he never employed Mr. Mooney to do any work on the hospital.

Keeley, examined for the defendant, substantially contradicted the plaintiff, so far as his memory served him. With regard to the extra work, as described by plaintiff, his testimony tends to corroborate the plaintiff concerning the change of color and requiring the panels of the doors to be made lighter, and the stiles darker.

He also testifies that extra work was done besides what was mentioned in the contract, that some was ordered by Sister Ermiliana, who by the terms of the contract, was authorized to make additions or require deviations from its provisions. He cannot state positively that he himself did not order some extra work.

In any view of the evidence the work was done, the materials were furnished, and now from part of the structure referred to in the contract. If, on the defendant's evidence, the work was such as the contractor should have performed, on the plaintiff's evidence it was extra work, ordered by the architect, by him deemed necessary in the construction of the building, to the benefit of which the defendant has succeeded, and there seems to be no legal reason why the plaintiff should not be paid according to his claim. It was for the referee to determine which of the two sets of witnesses he would believe, and what inferences he would draw from the facts stated by them. There is enough on the plaintiff's side to make out a case; and that is sufficient to deprive this court of jurisdiction to weigh the evidence.

We think the facts found by the referee are not conjectural, merely, but are supported by evidence, and upon those facts the plaintiff was entitled to judgment. The exceptions

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to evidence have been examined. They are general and not specific in form, and point to no substantial error.

The judgment should be affirmed.

All concur, except RAPALLO J., dissenting, and EARL, J., not voting.

ELIZABETH A. L. HYATT, Respondent, v. THE DALE FILE MANUFACTURING COMPANY (Limited), Appellant.

Court of Appeals, June 7, 1887.

1. *Patents. Consideration.*—A party manufacturing under a license cannot escape the payment of royalties by alleging the invalidity of the patent, so long as it has not been legally annulled.
2. *Same.*—The withdrawal of a notice of forfeiture of the agreement between the parties, under a clause therein at the request and upon the promise of the licensee to pay the royalties due, is a good and sufficient consideration for the licensee's promise, and such as will enable the patentee to maintain an action therefor.

Appeal from a judgment of the general term of the court of common pleas of New York city, affirming a judgment of the general term of the city court of New York city affirming a judgment in favor of plaintiff.

Edward D. McCarthy, for the company, appellant.

George W. Van Slyck, for Hyatt, respondent.

PECKHAM, J.—We think this case is controlled by that of *Marston v. Swett*, reported upon two appeals to this court. See 66 N. Y. 206, and 82 N. R. 526. The general and material features of the two cases are similar. In both there was an agreement on the part of the plaintiff to refrain from manufacturing, in consideration, among other things, of the promise of defendant to pay the royalties. While continuing the manufacture under the license, the defend-

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ant ought not to escape liability to pay the royalties. The defendant's counsel, it is true, seeks to distinguish this case from *Marston v. Swett* (*supra*), because, as he says, since the re-issue of the patent in 1881, which he insists was wholly void, the defendant has had no protection from the manufacture by others, for the reason that by the surrender of the patent of 1878, and the re-issue of 1881, there was no valid patent in existence, and the consideration for the promise to pay royalties had therefore wholly failed. There was consideration enough for the promise to pay such royalties, in that the plaintiff bound herself not to manufacture, and because the defendant could not be called to account as an alleged infringer while manufacturing under the license.

If it were a question of the validity of the re-issue of 1881, and a decision of that question were necessary to the decision of this case, the defendant is of course correct in his claim that a state court has no jurisdiction to determine such an issue; but within the decision of the *Marston* case, no such question arises. The defendant has protection enough to base its promise to pay royalties upon, as long as it so conducts itself towards plaintiff as to prevent her from treating it as an infringer. In other words, so long as the defendant continues to manufacture under its license (the patent not having been legally annulled) and thus elects to treat the agreement as in existence, it prevents the plaintiff from treating defendant in any other light than that of a licensee. If defendant desired to repudiate any obligation under this agreement, it should have given notice to plaintiff that it refused to no longer recognize its binding force, and that it would thereafter manufacture under a claim of right founded upon the alleged invalidity of the patent. Otherwise the defendant, in claiming to manufacture under the license, and in refusing to pay the royalties thereunder, would, if successful, prevent the plaintiff from recovering anything from it. She could not treat the de-

fendant as an infringer because it was manufacturing under a license from her, and she could not collect the royalties under the license (although herself refraining from manufacturing, as she had agreed), because the defendant would allege the invalidity of the patent, although continuing to manufacture under cover of a license from its owner. Such doctrine cannot stand a moment. Of course, as it is said in the Marston case, from the time that the patent is annulled by proper legal proceedings, no royalties could be collected, even though no notice of a repudiation of the agreement had been thereafter served.

There is another ground upon which it seems to me this judgment might well rest. Under the clause in the agreement between the parties, which provided for a forfeiture of all rights thereunder, if one party should willfully violate one of its provisions, the plaintiff gave notice of such forfeiture to defendant, based upon its refusal to pay the royalties which it had acknowledged to be due for the quarter ending October 31, 1881 (the very quarter in question here), an account of which it had rendered under the oath of its secretary as provided for in such agreement. Subsequent to the service of such notice the plaintiff withdrew the same at the request of defendant, and upon its promise to pay these very royalties which it had already acknowledged to be due. A failure to carry out such promise gives, as it seems to me, a good cause of action.

The defendant says there was no consideration for such a promise, because there was no patent upon which to ground a license, and the defendant therefore had no license and no protection. But the plaintiff, of course, contended that the re-issued patent was valid, and, at the request of defendant, the plaintiff withdrew her notice of forfeiture of the license, and thus reinstated the defendant in its possession, and freed it from the liability to be proceeded against as an infringer, and put to expense and inconvenience in the defense of such a litigation. This was saved at the

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request of defendant, and upon its special promise to pay the royalties. Plainly, here was a good and sufficient consideration for defendant's promise.

The judgment should be affirmed, with costs.

All concur.

JOSIE TEETS, Respondent, v. THE VILLAGE OF MIDDLETOWN, Appellant.

Court of Appeals, June 7, 1887.

Affirming same case, 34 Hun, 631, Mem; 20 W. Dig. 347.

Appeal. Reversal.—An erroneous ruling upon a question which affects the credibility of the witness only, if his evidence is wholly immaterial upon all of the material in issues of the case, furnishes no valid reason for reversing the judgment.

Appeal from a judgment of the general term of the supreme court.

Wm. F. O'Neil, for appellant.

Wm. Vanamee, for respondent.

PER CURIAM.—The exception taken by the defendant's counsel to the ruling of the trial court excluding an answer to his question, on cross-examination, to the plaintiff's witness as to whether he was engaged to the plaintiff or not, was undoubtedly well taken. It is always competent to inquire what relations exist between a party and his witness, for the purpose of showing the motive and influence under which the evidence is given, and the existence of any bias or prejudice on the part of the witness. Such evidence, however, affects the credibility of the witness only; and, if his evidence is wholly immaterial upon all of the material issues of the case, an erroneous ruling upon such question furnishes no valid reason for reversing the judgment. That was the case here. No material question of

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fact was controverted on the trial, and the evidence of the witness could have been wholly stricken from the minutes without affecting the result in the least degree.

The defendant was not prejudiced by the ruling, and the judgment should therefore be affirmed.

All concur.

MARY M. BOYLE v. JOSIAH W. BOYLE, HENRY J. WELCH,
Claimant, Respondent; ANNIE L. McCAHILL, Appellant.

Court of Appeals, June 14, 1887.

See 39 Hun, 658, Mem; 23 W. Dig., 346.

Bond of Indemnity. Administrator.—A bond of indemnity given by an administrator to the sureties on his bond, and conditioned to save them “from any loss or error which might arise from or be caused by said administration” does not cover expenses incurred by the sureties in an effort to be discharged therefrom, or in their effort to compel the administrator to account.

Appeal from a judgment of the general of the supreme court, affirming an order of the special term, confirming the report of the referee as to the priority and amount of liens in an action for partition of lands.

De Witt C. Brown, for Mrs. McCahill.

John W. Goff, for Henry J. Welch.

Jas. C. De La Mare, for A. J. Rogers.

PER CURIAM.—We are satisfied with so much of the order appealed from as directs that the claim of Mr. Rogers, as attorney in the partition suit shall be first paid out of the proceeds in the hands of the court, but we are not satisfied with the priority awarded to Welch. He was surety upon Mansfield's bond as administrator, and to protect him against

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that liability the assignment relied upon was made. But no such liability ever occurred. Mansfield, in the end, settled his accounts, and was discharged, and the decree shows that he paid out in funeral expenses more than the whole amount of the estate. Welch's loss did not come from his liability on the bond, but first from his effort to be discharged as surety, for which Mansfield was not accountable, and second, from his own interference in an endeavor to make Mansfield account. The expenses he incurred were the product of his own fears, and not contemplated by the indemnity, or fairly within its terms. While its language is quite broad, it plainly does not cover an expenditure not created by the suretyship, but by his own hostile endeavor to be rid of it. The purpose is stated to be to guard the bondsmen "from any loss or error that might arise from or be caused by said Mansfield's administration of said personalty." There was no such loss. The administration resulted in none. It came from Welch's fears that there might be one, and his own voluntary action and expenditure. The language expressing what is to be paid out of the share assigned is, "such loss, expense, sum, or sums of money as the said Henry J. Welch and Patrick J. Evans may incur or be put to from any loss, error, mishap, or cause whatsoever in relation or regard to their suretyship on the said bond." Here, again, is contemplated some loss flowing from liability as surety and which is incurred or put upon them from that cause. It is expressed again, "for any loss or expense they or either of them sustain or incur by reason of their suretyship on my said bond." No such loss occurred. Welch could have remained surety, and relied upon his indemnity. He chose not to do so. He sought to be relieved from the risk. That was his privilege; but the cost of it was not within his indemnity. He incurred further expenses in hostility to Mansfield. The result proved they were needless. Welch has his judgment against Mansfield, but is not entitled to be paid in preference to Mrs. McCahill.

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So much of the order as gives him that preference should be reversed; the order modified so as to give Mrs. McCahill preference in payment next after Rogers; no costs of this appeal to be allowed either party.

All concur.

GEORGE E. HYATT, as Receiver, etc., Respondent, v. WILLIAM W. DUSENBURY *et al.*, Appellants.

Court of Appeals, June 28, 1887.

Appeal. When aggrieved.—Where none of the appellants will be benefited by the reversal of the judgment appealed from, they are not aggrieved by the judgment, cannot appeal therefrom, and their appeal, if taken, will be dismissed.

See note at end of case.

A. Walker Otis, for the motion.

Moody B. Smith, opposed.

PER CURIAM.—The conveyances, second mortgage, and the assignment thereof, were all valid as between the parties thereto. Hence, in case this judgment could be reversed, and this plaintiff defeated, the surplus money which has been paid to him would belong to William W. Dusenbury as administrator and would have to be refunded to him. None of these defendants would be entitled to one cent thereof. Therefore they have no interest in this appeal. They are not aggrieved by the judgment and cannot appeal therefrom. Code, § 1294. William W. Dusenbury, as administrator, is the only person interested in prosecuting the the appeal, and he has not appealed, and is so bound by his stipulation that he cannot appeal.

The motion to dismiss the appeal should therefore be granted with costs.

All concur.

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The parties to an action, who are entitled to appeal from a judgment or order therein, are designated by § 1294 of the Code. The right of a person, not a party to the action, to appeal from a determination made therein, is prescribed by § 1296 of the Code.

These two sections read as follows :

§ 1294. A party aggrieved may appeal, in a case prescribed in this chapter, except where the judgment or order, of which he complains, was rendered or made upon his default.

§ 1296. A person aggrieved, who is not a party, but is entitled by law to be substituted, in place of a party ; or who has acquired, since the making of the order, or the rendering of the judgment appealed from, an interest, which would have entitled him to be so substituted, if it had been previously acquired, may also appeal, as prescribed in this chapter, for an appeal by a party. But the appeal cannot be heard until he has been substituted in place of the party ; and if he unreasonably neglects to procure an order of substitution the appeal may be dismissed, upon motion of the respondent.

Who cannot appeal.—No one but a party to the record can appeal from the judgment. *Martin v. Kanouse*, 2 Abb. 390.

Where a party has been brought in by amendment, subsequently to the commencement of the action, he has no right to appeal from a prior order in the suit. *Grant v. Hubbell*, 2 J. & Sp. 224.

In *ex parte Bristol*, 16 Abb. 397, it was held that, though a stranger may be allowed to apply for relief against the proceedings between other parties, he has no right to appeal from an order denying his application.

No appeal can be prosecuted in the name of a party against whom a final decree has been made, where he sells his right to the subject matter of the suit. *Mills v. Hoag*, 7 Paige, 18; *Kelly v. Israel*, 11 Id. 147; *Hackley v. Hope*, 4 Keyes, 123; 2 Abb. Ct. Ap. Dec. 296.

A party who has parted with his interest, during the pendency of the action cannot appeal from the judgment ; but, if his wife has an inchoate right of dower in the subject matter of the suit, he may join with her in an appeal. *Kiefer v. Winkens*, 3 Daly, 191; 39 How. 176.

In *Conner v. Belden*, 8 Daly, 257, it was held that a receiver cannot appeal from an order removing him, unless he is a party to the suit in which he is appointed.

In *E. B. v. E. C. B.*, 28 Barb. 290, it was held that, where an action is brought against a married infant by her husband to dissolve the marriage contract on the grounds of impotence, the mother of the defendant has no interest in the matter which will allow her to intervene, become a party to the litigation and appeal to the general term ; especially after a guardian *ad litem* has been appointed for the infant.

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In *Goldsmith v. Goldsmith*, 11 W. Dig. 551, an action was brought for divorce on the ground of adultery. The defendant appeared, but did not answer; and on the reference to take proof, he appeared by counsel, cross-examined the witnesses, took and filed exceptions to the referee's report, and, on the motion to confirm the report, was fully heard. Judgment was granted, and the defendant appealed. A motion was made to dismiss the appeal, and it was held that the case fell within § 1294 of the Code, which cuts off the right of appeal where a judgment is rendered by default.

In *Marvin v. Marvin*, 11 Abb. N. S. 97, it was held that legatees may intervene in the proceedings for the probate of a will before the surrogate, and upon an appeal from his order; but if they do not intervene, and a final judgment is rendered declaring the invalidity of the instrument propounded as a will, they cease to be interested parties, and cannot appeal from an order of the surrogate, directing the annulment of the record, awarding costs against the executor and requiring him to file an inventory of the intestate's effects which have come into his hands. The executor then represents them, and they are bound by his acts.

In *People ex rel. Steingoetter v. The Board of Canvassers of Erie Co.*, 50 Hun, 601, the relator and one Bishop were opposing candidates for election to the office of County Treasurer of Erie County. The county canvassers made two statements of the votes cast in the election district. A writ of mandamus was issued directing the canvassers to adopt and include the last statement in the canvass, and this was done by the board. The motion for the writ was brought to a hearing upon an order to show cause, and, at the hearing, the counsel for Bishop stated to the court that, as the opposing candidate for the office of county treasurer, he was interested in the motion and desired to be heard and was allowed to appear and be heard by the court. Bishop appealed from the order directing the writ to issue, and, as the relator's attorney refused to recognize his right to appeal, a motion on Bishop's behalf was made for an order to the effect that he appeared in, and was made a party to, the proceeding. This motion was denied. And it was held that his appeal cannot be supported unless he may be treated as a party to the proceeding; and he, as a matter of right, was not entitled to be made or substituted as a party defendant. Nor does he come within the provision of § 1296 of the Code which provides that a person aggrieved who is not a party, but is entitled by law to be substituted in place of a party, may appeal, though his appeal cannot be heard until he is so substituted.

In *Hoag v. Hatch*, 52 Hun, 615, in an action to foreclose a mortgage, executed by one defendant alone, to secure a bond executed by both defendants, who were husband and wife, the special term struck out the wife's answer as sham and directed judgment thereon as frivolous, and judgment was entered upon the order and the premises sold. The wife took an appeal from the judgment which was affirmed. Afterward the husband, who did not execute the mortgage, appealed from the order striking out

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his wife's answer, and a motion was made to dismiss the appeal. And it was held that his appeal should be dismissed, for the reason that he had no interest in the mortgaged premises, and it was not shown that any deficiency remained on the debt for which he was bound after applying the proceeds of the mortgage sale.

The rule in chancery was, that no one can appeal from an order or decree who is not injured thereby, and even a party who is aggrieved by one portion of a decree does not thereby acquire a right to call in question another portion thereof, which has no bearing or effect upon his rights or interests. *Hackley v. Hope, ante; Cuyler v. Moreland, 6 Paige, 273; Idley v. Bowen, 11 Wend. 227.*

In the case first above cited, it was held that, where a party has released all his interest in a suit, he has no right to appeal from an order or decree made therein, which does not prejudice him, though it may be wrong as to other parties. See *Steele v. White, 2 Paige, 478.*

In *Matter of Watson v. Nelson, 69 N. Y. 536*, an executor was committed to the county jail by virtue of a warrant of commitment issued by a surrogate upon an order adjudging said executor in contempt for disobedience of a final decree, directing him to pay over a specified sum to various parties named therein. He was discharged by order of a justice of the supreme court in proceedings on *habeas corpus*, and the general term, on writ of *certiorari*, affirmed the proceedings. On appeal to the court of appeals, and motion to dismiss the appeal, it was held that one of the parties named in the surrogate's decree as entitled to a portion of the sum, who was not named in the writ of *certiorari*, had no such standing in the proceedings as to entitle her to appeal to this court.

In *Ross v. Wigg, 100 N. Y. 243*, an attachment and order of arrest were issued and executed. The defendant obtained an order to show cause why they should not be vacated, the motion was denied, and defendant appealed from the order. Before such appeal, other creditors obtained a judgment against defendant, supplementary proceedings were instituted, and a receiver appointed. Subsequently the appeal from the order was argued, defendant offered judgment and stipulated that an order should be entered dismissing the appeal, and an *ex parte* order to that effect was entered. Notwithstanding this, the general term affirmed the order appealed from, and the order of affirmance was entered by the receiver; and the defendant's attorney appealed therefrom in defendant's name to the court of appeals and moved to substitute the receiver as defendant. And it was held that the receiver was not entitled to appeal or be substituted. He is not an aggrieved party. He is in no way bound or affected by the order from which he has brought the appeal. That order simply affirmed an order previously made to which he was not a party. The fact that it may remotely or contingently affect interests which he represents, does not give him a right to appeal. Before a person can be said to be aggrieved within the meaning of § 1296 of the Code by an adjudication, it must have binding

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force against his rights, his person or his property. But before one, not a party, can claim the right to appeal, he must not only be aggrieved, but he must be entitled to be substituted in the place of a party who has a right to appeal.

In *Platt v. Platt*, 105 N. Y. 488, after a sale in a partition suit, a referee was appointed to take proof of the interests and rights of the several parties and claimants in the fund. The referee reported, and exceptions were taken by some of the parties to the report of the referee, so far as it related to a certain claim. The exceptions were overruled, and the report confirmed by the special term; and the order was affirmed on appeal to the general term. On appeal to the court of appeals, it was held that the parties, who had not filed exceptions or appealed to the general term, had no right to appeal to this court.

In *People ex rel. Breslin v. Lawrence*, 107 N. Y. 607, the relator was arrested by virtue of a warrant issued by a police justice of the city of New York, charging the violation of the excise law, and was, upon *habeas corpus* before Judge LAWRENCE, remanded to custody. On application of the prisoner, the general term allowed a writ of *certiorari*, directed to defendant requiring him to return to that court the record of the *habeas corpus* proceedings. Upon his doing so, the prisoner was ordered to be discharged from custody. A notice of appeal was then served upon the relator's attorney, stating that "Abraham R. Lawrence, one of the justices of the supreme court, appeals to the court of appeals from the order of the general term," above described. And it was held that said justice was not the proper person to take an appeal to this court; that the decision affected no substantial right of his within the meaning of § 519 of the Code of Criminal Procedure, or of any person of whom he was the legal representative or agent. After deciding that the relator was not illegally detained in custody, he had no further duty to perform. He was no more bound to see that the relator was kept in custody than any other citizen. He was not hindered by the order appealed from in the discharge of any duty, or the exercise of any power, conferred upon him by law, and, therefore, had no more interest or right to appeal than any judge whose decision has been interfered with or reversed. But it seems that the appeal, in such case, should be taken "in the name of the People" by the attorney-general or a district attorney.

In *Hooper v. Beecher*, 109 N. Y. 609, appeals were taken from the judgment in this action, and from two orders of the general term, one denying a motion for reargument, and the other modifying a previous order of the general term granting costs against the defendants and making the costs payable out of a fund in the hands of one of the defendants. Motions were made by plaintiffs to dismiss the appeals, and it was held that, as the order of the general term modifying its previous order and making the payment of costs a lien upon the funds in the hands of one of the appellants was granted upon the appellants' own motion, they could not appeal

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therefrom. They thereby obtained the precise relief for which they had made application. A party, in whose favor a judgment is entered or an order made, cannot be aggrieved by it, and he is, therefore, in no position to claim the right of appeal.

In *Foster v. Foster*, 7 Paige, 48, it was held that, where a wife appeals from the decision of a surrogate admitting a will to probate, which is affirmed, the husband cannot appeal from the decree of affirmance, without joining his wife.

Who can appeal.—A purchaser at an administrator's sale may appeal from a surrogate's order setting it aside, as he has an inchoate right which entitles him to a hearing. *Delaplaine v. Lawrence*, 10 Paige, 602.

So a purchaser at foreclosure sale may appeal from an order setting it aside. *Mortimer v. Nash*, 17 Abb. 229 n.

In *Wells v. Danforth*, 1 Code N. S. 415, it was held that an appeal lies, notwithstanding a payment of the judgment, unless such payment was made by way of settlement.

In *Vandemark v. Vandemark*, 26 Barb. 416, it was held that a devisee or legatee may appeal from an order of the surrogate, admitting a will to probate, notwithstanding he was one of the persons who presented the will to the surrogate, and petitioned for its probate.

In *Landers v. Fisher*, 24 Hun, 648, a party to whom another has been enjoined from paying money was held to be entitled to appeal from the injunction order, as he was the party aggrieved.

In *Kelsey v. Pfaudler Process Co.*, 19 Abb. N. C. 427, a corporation was adjudged to be dissolved, and, from such judgment, appealed. A motion to dismiss the appeal was made, and it was held that a corporation aggrieved by a judgment declaring it to be dissolved, is no exception to the rule that every party litigant has the right to appeal from a judgment by which he is aggrieved. It has sufficient existence to appeal. It not only may appeal from the judgment, but from an order based upon the judgment or growing out of proceedings taken to enforce or execute it.

In *Babcock v. Arkenburgh*, 42 Hun, 660, the attorneys for all the parties in the action, with the exception of a single defendant who appeared in person, signed a stipulation providing for the payment, out of a certain fund, of the disbursements taxed and included in a judgment entered in an action, and also for the payment of the costs of an appeal taken to the court of appeals from the order of the general term. Upon the refusal of the one defendant to sign the stipulation, a motion was made for an order according to the terms of such stipulation, which was granted, and from this order an appeal was taken to the general term. Upon the hearing of the motion at the special term some of the parties who were represented by an attorney, appeared and with the defendant opposed the motion. On the hearing of the appeal, at general term, it was claimed that the parties who were represented in the action could not be appellants in person. But it was held that they are in hostility to their attorney, who signed the

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stipulation mentioned, and may, therefore, properly appear, as to this proceeding, in person and appeal in the same way; and that the court would not, under the circumstances, decline to hear and dispose of the appeal.

In *Sanford v. Sanford*, 58 N. Y. 67, the defendant, after the recovery of judgment and an appeal to the general term, was declared a bankrupt on his own application. The plaintiff proceeded and obtained a judgment of affirmance and for the costs of the appeal. From that judgment the defendant appealed to the court of appeals, and plaintiff moved to dismiss the appeal on the ground that it can only be prosecuted by the assignee in bankruptcy. And it was held that the judgment debtor has a sufficient interest in the judgment of affirmance to sustain an appeal therefrom by him to this court. The judgment of affirmance appealed from contains also a judgment against the bankrupt for the costs of the appeal incurred after the bankruptcy. These costs would not be provable against the bankrupt's estate, and his liability therefor would, consequently, not be affected by the discharge should he obtain one, and, as to the recovery for these costs, the assignee has no interest. Where the bankrupt is seeking to maintain a right to property, which right, if existing, has passed to the assignee, the latter is the proper party to prosecute the action or appeal. And when the former is seeking to prevent the establishment of a claim against himself, the assignee, in the interest of creditors, may well be allowed to intervene in order to exclude claims which, if established, might be entitled to dividends. But, in the latter case, the bankrupt also has an interest sufficient to entitle him to maintain an appeal. He may never obtain a discharge, and then the erroneous judgment will be a charge upon him.

In *Attorney-General v. North America Life Ins. Co.*, 77 N. Y. 297, proceedings were instituted by the attorney-general for the appointment of a receiver of a life insurance company, pursuant to the act of 1869, and an order was made therein at a special term permitting the attorneys for a policy holder and any person similarly situated to appear in all motions and proceedings in the action. Prior to the making of this order, a receiver had been appointed. And it was held that it was competent for the court, in the exercise of its equitable jurisdiction, to permit parties, interested in the administration of the property and assets of the corporation, to appear and be made parties to proceedings taken by or against the receiver, by which their rights might be affected; and that this right to appear and become parties to such proceedings included the right to appeal from orders made affecting their interests.

In *Bockes v. Hathorn*, 78 N. Y. 222, the plaintiff, as trustee, brought a suit to foreclose the trust mortgage. There were two co-trustees, one refused to begin, the other to continue, as plaintiff; and they were made defendants. An issue was tried as to the validity of certain bonds and coupons which were in the hands of corporations or persons, and as whether they were entitled to share in the trust fund; and the referee ad-

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judged that they were not valid and disallowed their amount. From the judgment entered on the report of the referee, an appeal was taken in the name of the trustee, who was the sole plaintiff. This was allowed by an order of the court to be done in his name by others; and from that order an appeal was taken to the court of appeals, and it was held that, as the plaintiff was a trustee of a fund for the security of an indebtedness to others, he was aggrieved by a judgment which reduces the number of those who are interested in it. It is his duty to protect the fund from unfounded claims upon it; and he is not aggrieved when an unreal claim has been defeated. It is his duty also to protect and assist real claimants in reaching their due share of the fund. And it is his duty, when he has sued for an enforcement of the general indebtedness, to see that the aggregate adjudged is large enough to cover all the claims that really exist, and to see that no real claimant is adjudged to be without right; and he is aggrieved when a real claim is not added into the amount adjudged to be due, and a real claimant is shut out by the judgment from a share in the proceeds of it.

And it was also held that the plaintiff in such an action may, and it is his duty in a proper case, to permit his name to be used by a *cestui que* trust, for the review of a judgment fatally adverse to the latter; and the court may by order permit such an appeal to be brought.

In the Matter of Guardian Savings Institution, 78 N. Y. 408, a party was appointed receiver of an insolvent savings bank and executed his bond with a surety. He entered upon his duties, but subsequently, by leave of the court, resigned, and a new receiver was appointed. An order of the special term was made settling the accounts of the former receiver, which contained a clause authorizing the surety to appeal on stipulating to be bound by the decision thereon. The surety appealed to the general term, making the required stipulation, which was accepted by the opposite party. The appeal was heard without objection to the right of the surety to appeal, and the order was affirmed with the direction that the surety pay to the new receiver the amount of the bond. The surety appealed from this order to the court of appeals, and it was held that he was entitled to take such appeal.

In *Hobart v. Hobart*, 86 N. Y. 636, an action was brought for partition of lands situate in the city of New York. The referee stated and claimed in his report the fees allowed by the Act in relation to such sales in said city. The special term confirmed the report except as to fees, and allowed the referee \$25 over and above disbursements. The referee appealed to the general term, which affirmed the order of the special term, and then appealed to the court of appeals. And it was held that he had such a standing as enabled him to appeal. He was a party to the special term order, and, so far as that order deprived him of his legal fees, it did not rest in discretion but affected his substantial rights. The order was not made by default, but upon reading and filing his report, in which he claimed proper fees and commissions. He was also a party to the general term order.

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This was an order against him, and he could appeal from it under of § 1294 the Code. It is a mistake to suppose that no one can appeal from an order made in an action, unless he is a party to the action. Every one who can properly be called a party to the order, and who is aggrieved thereby, may appeal. The court of appeals, under this view, has repeatedly entertained appeals by purchasers at judicial sales, by attorneys, by sheriffs, and by other persons.

In *People ex rel. Burnham v. Jones*, 110 N. Y. 509, an application for title to certain lands was filed by the Bartholomay Brewing Co. before the commissioners of the Land Office, and opposed by the relator upon the ground that he was the owner of a portion of the adjacent uplands. The commissioners, after hearing both parties, passed a resolution that a patent issue to the said company substantially as asked for. To review the commissioners' action, a writ of *certiorari* was granted by the supreme court, and the matter was heard at the general term, which reversed the said resolution and denied the application of the company. Upon this decision a final order was entered, from which the commissioners and the company have separately appealed to the court of appeals. A motion was made to dismiss the appeal. And it was held that the commissioners are aggrieved by the decision of the general term, and, therefore, have a right to appeal therefrom. This decision, if sustained, interferes with their exercise of the power to grant so much of the lands under navigable waters as they should deem necessary to promote the commerce of the state, or for the beneficial enjoyment of the same by the adjacent upland owners. It is their duty, representing both public and private interests, to defend any determination which they have made and which they believe to be right. Though they did not have any property or pecuniary interest in the matter in controversy, they were, in a legal sense, aggrieved by the decision appealed from. That officers thus situated may be both appellants and respondents upon appeals to the court of appeals, is shown by the uniform practice for many years. See the following authorities: *Allen v. Commissioners of Land Office*, 38 N. Y. 312; *People ex rel. Cayuga Indians v. Commissioners of Land Office*, 99 Id. 648; *People ex rel. Mayor, etc., v. McCarthy*, 102 Id. 630; *People ex rel. Millard v. Chapin*, 104 Id. 96; *People ex rel. Wright v. Chapin*, Id. 369; *People ex rel. N. Y. O. & W. R. R. Co. v. Chapin*, 106 Id. 265.

Statement of the Case.

**ERASTUS S. PROSSER, Respondent, v. THE FIRST NATIONAL
BANK OF BUFFALO *et al.*, Appellants.**

Court of Appeals, October 4, 1887.

1. *Appeal. Order of reversal.*—Where the order of reversal by the general term does not specify that the reversal was upon questions of fact, its justification must be found in some error of law revealed by the record.

See note at end of case.

2. *Same. Finding of trial court.*—The finding of the trial court does not present any error of law unless it is unsupported by any evidence, or is against the evidence. Such finding, when not disturbed by the general term, concludes the court of appeals, if there is any evidence upon which it can properly be based.
3. *Corporations. Officers.*—Where the president of a bank personally purchases shares of stock and takes, without either actual or implied authority to do so, the funds of the bank to pay therefor, he commits a breach of trust, and the bank can rely for indemnity entirely upon him and hold him as its debtor for the amount taken, or can treat him as a trustee of the stock for its use, and enforce the trust for its benefit by compelling a transfer or sale of the stock for its account, and if the bank has not claimed the stock, it cannot be held liable for the president's deceit, in the sale of such stock.

Action brought to recover damages sustained by plaintiff in the purchase of certain shares of stock, induced by certain false and fraudulent representations as to the financial condition of the defendant made by its president on its behalf.

Appeal from an order of the general term of the superior court of Buffalo, granting a new trial to plaintiff, reversing an order of the special term of the same court, and also reversing a judgment in favor of the defendant.

Green, McMillan & Gluck, for respondent.

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James F. Gluck, of counsel.

John G. Milburn and *Ansley Wilcox*, for appellant.

EARL, J.—The complaint alleges the incorporation of the defendant bank, and that R. Porter Lee was duly elected president thereof on the 10th day of January, 1882; that on or about the twenty-first day of the same January the plaintiff was solicited by the president of the bank to purchase some of the stock of the bank, and that, as an inducement thereto, the bank, through its president, stated to the plaintiff that it was in a solvent and flourishing condition; that its bad and doubtful debts did not amount in all to the sum of \$50,000 and that if it should then be wound up, the stockholders would receive a premium of at least sixty dollars on every one hundred dollars worth of stock held by them; that such representations were false and untrue to the knowledge of the president, and the bank was at the time insolvent; that relying upon such representations, the plaintiff purchased fifty shares of the stock owned by the bank, and paid the bank therefor the sum of \$8,000, and received a certificate therefor signed by the president and cashier; that by means of such purchase and the subsequent failure of the bank, the plaintiff became liable to contribute toward the payment of creditors of the bank of the sum of \$5,000 under the national bank act; that by reason of such purchase and failure the plaintiff has sustained damages in the sum of \$13,000; that a receiver of the bank was duly appointed on the 22d day of April, 1882, and that he has filed with such receiver proof of his claim for such damages and demanded of him payment thereof, and has also tendered the certificate of the stock to him and offered to surrender the same, and demanded the sum thereof, which was refused; and the prayer for relief is as follows: "Wherefore this plaintiff demands judgment against the defendants, declaring the purchase of said stock void and setting the same aside, and for the

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payment to him out of the assets of said bank as a preferred creditor of the sum of \$18,000, with interest as aforesaid from the 21st day of January, 1882, or for such other or further or different relief as to the court from all the facts shall seem adequate, equitable and just."

It is thus seen that the precise and only cause of action alleged is the damages sustained by the plaintiff in consequence of the purchase by him from the bank of certain shares of its stock belonging to it, which purchase was induced by certain false and fraudulent representations as to its financial condition made on its behalf by its president.

The answer put in issue the ownership and sale of the stock by the bank, and the alleged false representations.

The action came to trial before a judge and a jury, and the following questions were submitted to the jury:

1. Were the representations made by Mr. Lee about the financial condition of the bank at the time of the purchase of the stock to Mr. Prosser false and untrue?
2. Did Mr. Prosser rely upon those representations in the purchase of the stock and believe them to be true?
3. Was the bank insolvent at the time these representations were made?
4. Did Mr. Prosser make the contract of purchase with Mr. Lee as the agent of the bank?
5. Did the bank own the stock?
6. Did the bank get the money?

The jury answered the first, second and third questions in the affirmative and the other questions in the negative.

Thereupon the trial judge heard further evidence, and subsequently filed his decision containing findings of fact and of law. Among his findings of fact are the following: "The said bank did not make to said plaintiff, through its president or otherwise, the statements and representations touching the condition of said bank, or in respect to the stock thereof, which are in that behalf in said complaint set

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up and alleged, or either of them ; " " that said plaintiff did not purchase of said bank fifty shares of its stock, or pay said bank therefor, but he purchased the same of R. Porter Lee and paid him therefor ; " and he found as conclusions of law that the plaintiff was not entitled to the relief demanded by him, and that the complaint should be dismissed.

Thereafter, before the entry of judgment, by the consent of the parties, an order was entered staying further proceedings that the plaintiff might prepare a case and exceptions, as recited in the order, "to the end that all questions of fact in the case, and especially the fourth, fifth and sixth findings of the jury alleged by plaintiff to be irregular and incorrect, may be fully considered by the court prior to the entry of judgment herein."

The motion for a new trial was subsequently brought on, heard and decided, and thereafter judgment was entered dismissing plaintiff's complaint. From that judgment plaintiff appealed to the general term, and there the judgment was reversed and a new trial ordered. The order of reversal does not specify that the reversal was upon questions of fact, and, therefore, its justification must be found in some error of law revealed by the record.

Several interesting questions of law are discussed with much ability and learning in the brief of the plaintiff's counsel, which we do not deem it important to determine. We will assume that if this stock belonged to the bank, and the president disposed of it to the plaintiff, making the representations alleged in the complaint, this action could be maintained ; and we will further assume that if the president represented to the plaintiff that the stock belonged to the bank, and sold it to him assuming to act for and to represent the bank, the action could be maintained, although the bank did not own the stock.

But the fundamental difficulty with the plaintiff's case is, that the bank did not own the stock, and that the president

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did not represent that it owned the stock, nor assume to act for it, or on its behalf, in making the sale thereof to the plaintiff.

The finding of the trial court to this effect, sustained by sufficient evidence, and not reversed at the general term, concludes us.

As to the ownership of the stock, there is no real dispute upon the evidence. The United States Bank act (U. S. R. S., § 5201), prohibits a national bank from making any loan or discount on the security of the shares of its own capital stock, and from purchasing or holding any of such shares, unless it becomes necessary to prevent loss upon a debt previously contracted in good faith. The capital of the bank was \$100,000, divided into one thousand shares of \$100 each. Lee entered the bank in the spring of 1862 as messenger boy, and remained in that position for about three months, when he was made a bookkeeper. Then he became successively teller, assistant cashier, cashier, vice-president, and finally, on the 10th day of January, 1888, about three months before the failure of the bank, president. On the same 10th day of January, one McKnight was chosen cashier of the bank. At that time Lee owned more than one-half of the capital stock of the bank, and the directors allowed him substantially to control and direct the financial affairs and business transactions of the bank. On the 11th day of January he entered into contract with Mrs. Stagg for the purchase from her of fifty shares of the capital stock of the bank, for the price of \$6,500, and to obtain the money to pay for such stock McKnight at his request made a note for \$6,500, which he indorsed and placed in the bank as discount paper. He then drew from the bank \$6,500, and paid Mrs. Stagg for the stock, and took a transfer thereof. On the 18th day of January, he bought of one Vought 148 shares of the bank at \$160 per share, and to pay for the same he made a call loan from the bank of \$23,600, and then obtained a New York draft from the bank, which he delivered

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to Vought in payment of the stock. The call loan was made to him in the same way that call loans were made to other customers of the bank, but without any security. In purchasing these two parcels of stock he did not assume to act for the bank, but he negotiated for and purchased them in his own name; they were transferred to him individually, and all this stock stood in his name on the books of the bank on the 21st day of January, when he made the sale to the plaintiff. The money received by Lee upon the sale to the plaintiff was used by him to pay the note held by the bank for \$6,500, and to apply in reduction of the call loan.

Lee had no actual authority to buy this stock for the bank, and he could have no implied authority to buy it and thus violate the law, and he did not, in fact, buy it for the bank. The evidence tends to show that he purchased this stock for the purpose of getting it out of the hands of persons who were not useful to the bank, and selling it to persons who would be useful, and in this way he expected and intended to benefit the bank and its stockholders. But this did not make the bank owner of the stock or the purchase thereof a bank transaction.

In taking the funds of the bank to make the purchases, Lee committed a breach of trust, and upon familiar principles of law the bank could have followed its funds into the stock before a sale thereof and claimed the same. But it was optional with it whether it would do this or not. It could have relied for indemnity entirely upon Lee and held him as its debtor for the sums taken, refusing to take and allowing him to retain the stock; or it could have treated him as a trustee of the stock for it, and enforced the trust for its benefit by compelling a transfer or sale of the stock for its account. But the bank never claimed the stock; some of it was sold and the proceeds applied in repayment of the sum unlawfully taken from the bank, and thus there is no reason, whatever, for saying that the bank in any

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way became the owner of the stock. Suppose, instead of buying stock, Lee had brought for himself a steamboat with the funds taken from the bank. It could have followed its funds into the steamboat and claimed the same. But it would not have been obliged to do so, and its option to do so would certainly have been lost when the boat had been sold and the proceeds of the sale used to replace the funds unlawfully taken.

We, therefore, conclude that the bank did not own this stock and had no stock to sell.

There was some evidence that Lee represented that the stock belonged to the bank and that he assumed to sell it for the bank. But such evidence was not conclusive. The trial court found the fact to be otherwise, and its finding does not present an error of law unless it was unsupported by any evidence, or was against the evidence. The finding not disturbed by the general term concludes us if there was any evidence upon which it could properly be based, and that there was such evidence seems to us reasonably clear.

As we have already shown, the stock did not belong to the bank, stood on the books of the bank in Lee's name and was by him transferred to the plaintiff. On the face of all the papers it was the individual transaction of Lee with the plaintiff. Independently of the evidence to which we will now call attention, it is highly improbable that Lee would sell his own stock as the stock of the bank. There was no reason for his doing so. The plaintiff wanted to buy the stock and it must have been a matter of utter indifference to him who owned it. All he wanted when he purchased was a good title, and that he could get as well from Lee as owner as from the bank. He had confidence in Lee as he was willing to buy knowing that he had substantial control and management of the bank. There was no motive, therefore, for selling the stock as belonging to the bank, or for making the false representations that the bank had bought the stock and then owned it, and the pre-

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sumption is very strong that the transaction was what upon the face of the papers it appears to have been. The weight to be given to these facts, inferences and presumptions was for the trial court, and it was to determine whether it was overcome by the other evidence. All the other evidence came from the plaintiff and Lee, who was produced as a witness by him. The plaintiff was an interested witness, and Lee, who had committed a breach of trust, and a crime in unlawfully taking the funds of the bank, and who had by false representations committed a gross fraud upon the plaintiff, was a discredited witness; and it was for the trial court to determine how much credit should be given to the evidence of these witnesses and how much it should weigh against the facts, inferences and presumptions referred to; and it would not have been error of law if it had wholly discredited it as it was quite improbable, so far as it tended to show that Lee did the absurd and useless thing of selling his own stock as the stock of the bank. The whole of the plaintiff's evidence touching the ownership of the stock and the representations of Lee in reference thereto, is as follows:

"On the 21st of January, 1882, having previously left my bank book at the bank to have some interest credited to me, I called for the book. Mr. Lee apologizingly said that he had instructed the bookkeeper to allow me interest, which the bookkeeper had before stated to me that he was not authorized to do. The bookkeeper brought me my book, with some interest credited to me. I had quite a balance there for me, and, noticing the amount of interest, I thought it small; the rate was four per cent. I had a balance there and I desired to put it into something, and asked Mr. Lee if he knew of anything good to buy. In response to that question he said: "We can sell you some of our stock, if you would like." I inquired how much he had for sale. He replied: "Any portion of fifty shares." I inquired the price. He said 160; that he had sold a few

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small lots at that. I asked Mr. Lee if that was not rather steep, a large price. In response to that he said: "We think not. It is precisely the price that the bank took it in at a few days ago, and which such men as S. O. Barnum and Charles D. Marshall have paid for small lots."

The plaintiff made no inquiry as to the ownership of the stock, and there was no distinct allegation as to it by Lee; and there was nothing in the conversation or negotiation between them which made the matter of ownership of any importance. The only item of this evidence which really supports the theory of the plaintiff is the alleged representation by Lee that the bank "took it in" a few days before at the same price for which he offered to sell it. Whether that representation was made, whether what Lee said was misunderstood, misapprehended or incorrectly remembered were matters for the determination of the trial court. In that portion of his evidence the plaintiff was not corroborated by Lee. He testified substantially as follows:

"He came in again a day or two after that and asked me if there was any stock of the First National Bank of Buffalo for sale. I told him there was a little in the market, and he wanted to know how much it was worth. I told him I had sold some for 160. He wanted to know if that was not pretty steep. I told him we thought it was worth that. He said he had bought a little of the Manufacturers and Traders' Bank stock and had left an order for more, but he thought he would like to get some of ours. He asked me how the bank was fixed, and I took him into the back room and I think I drew him off an abstract of the statement of the books, and he took it away with him and looked at it over night. He came in the next day and asked if the loans were all good. I told him, 'You know every bank has some loans that are not good.' He asked me how much we had that was not good, and I told him if everything came out all right, as I expected, it would be pretty much all good. I think, after hearing his testimony to-day, that he did men-

tion \$50,000, and I think that I did tell him if everything did turn out as I expected it would, there would not be more than that amount of bad loans. He handed me a check for \$8,000 and told me to make out a certificate for fifty shares."

Q. What was said by him to you in relation to the ownership of the stock by the bank at that time?

A. I think I told him "we have the stock."

"I find upon the transfer book of the bank a transfer of this stock to Mr. Prosser. The written part of the certificate is in my handwriting, and it is as follows: 'First National Bank. For value received I hereby sell, transfer and assign to E. S. Prosser fifty shares of the capital stock of the First National Bank, subject to all the conditions and liabilities of the articles of the association and by-laws. Witness my hand in Buffalo this 21st day of January, in the year 1882. R. P. Lee.' It is not signed as president."

The plaintiff called Lee for further examination before the court after the jury had made their findings and had been discharged, and the following questions were put to him and answers given: "Q. Now, Mr. Lee, in the conversation that took place between yourself and Mr. Prosser in the bank, you may state whether or not you did not use words to this effect: "We have some stock for sale." In the course of that conversation, were these words used in respect to the question of how much it cost, Mr. Prosser having said, "Don't you think that is pretty high?" And did you not say, "That is the same price the bank took it in at a few days ago?"

A. I don't remember using the expression, "took it in at a few days ago," but I could not swear I did not use it.

Q. Did a conversation of that purport take place?

A. Yes sir, of that general purport; these two last points you have spoken of.

By the court—Mr. Lee, you have said, in a general way, that you have made some statement that was in substance

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to the effect of what the counsel stated. Did you state, and if you did, tell in what manner you stated to Prosser that this stock belonged to the bank?

A. My best recollection is that I did not use the expression "of the bank;" but, my impression is, I used the expression, "we have some stock." I do not think Mr. Prosser inquired particularly as to who the owner of the stock was.

Q. You do not desire to be understood as swearing that the expression was not used?

A. No, sir; that is my best recollection of it.

It will thus be seen that Lee testifying to the same transaction covered by the plaintiff's evidence fails materially to confirm him. Taking the evidence of these two witnesses, as they gave it, it is by no means clear that there was any dealing as to any stock of the bank, any representations that the bank owned the stock, or any assumption to sell it on behalf of the bank. But when all the circumstances, with the inferences, probabilities and presumptions are weighed and considered, we think there was enough to authorize a finding that the stock was not sold as the stock of the bank, and that the dealing of the plaintiff in reference thereto was really as it was actually upon the papers with Lee as owner.

This conclusion upon the facts, leaves the plaintiff without the cause of action alleged in his complaint, and it is not important to inquire whether he had any other cause of action against the bank growing out of his purchase of the stock from Lee and the representations made by Lee.

We have carefully examined and considered other exceptions to which our attention has been called, and we do not think any of them point out any error, and they are not of sufficient importance to require any attention here.

The order of the general term should be reversed and the judgment of the trial term affirmed, with costs.

All concur except RUGER, Ch, J., not voting.

Point on Review upon Reversal on Questions of Fact.

POINT ON REVIEW IN COURT OF APPEALS UPON REVERSAL ON
QUESTIONS OF FACT.

The jurisdiction of the court of appeals to review questions of fact is mainly defined by sections 1337 and 1338 of the Code of Civil Procedure, which read as follows:

§ 1337. An appeal to the court of appeals from a final judgment, or from an order, granting or refusing a new trial in an action, or from a final order affecting a substantial right, made, either in a special proceeding, or upon a summary application after judgment in an action, brings up for review, in that court, every question, affecting a substantial right, and not resting in discretion, which was determined by the general term of the court below, in rendering the judgment or making the order, from which the appeal is taken; except that a question of fact, arising upon conflicting evidence, cannot be determined upon such an appeal, unless where special provision for the determination thereof is made by law.

§ 1338. Upon an appeal to the court of appeals, from a judgment, reversing a judgment entered upon a referee's report, or a decision of the court, upon a trial without a jury; or from an order granting a new trial, upon such a reversal; it must be presumed, that the judgment was not reversed, or the new trial granted, upon a question of fact, unless the contrary clearly appears, in the body of the judgment or order appealed from. In that case, the court of appeals must review the determination of the general term of the court below, upon the questions of fact, as well as the questions of law.

In trials by court.—In *Bunten v. The Orient Mut. Ins. Co.*, 2 Keyes, 667, the defendant's argument, on appeal to the court of appeals, was chiefly made upon the proper conclusions of fact to be drawn from the testimony, and the court held that it was not at liberty to consider that subject; that the argument of fact is to be made to the court trying the cause, and to the general term, if an appeal is taken. But it goes no further, except in the single case where the general term reverses the judgment below, and certifies that the reversal was made upon questions of fact. Where that circumstance does not exist, this court can only consider such questions of law as may be presented, assuming the facts to be in all respects as certified by the court below.

In *Shaw v. The N. Y., L. E. & W. R. R. Co.*, 20 W. Dig. 136, a judgment was rendered for defendant which was reversed by the general term, on the ground that upon the evidence one of two conclusions was irresistible, either of which involved a question of fact. The order of reversal did not state that it was made upon questions of fact. And it was held that, under § 1338 of the Code Civ. Pro., the reversal must be deemed to have been made, not upon any question of fact, but upon questions of law only, and that the respondent is not in a position to avail himself of the construction placed upon the facts by the general term, or to review the facts for the purpose of sustaining the conclusion arrived at by it upon the same. The

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opinion of the court cannot be cited to sustain the reversal, and it can only be justified by some error of law. *Van Tassel v. Wood*, 76 N. Y. 614; *Weyer v. Beach*, 79 Id. 409; *Ward v. Craig*, 87 Id. 550. It was the respondent's duty to see that the order showed that the judgment was reversed upon the facts.

In *Beebe v. Mead*, 83 N. Y. 587, it was held that, where the record shows that the general term ordered a new trial both on the law and the facts of the case, the question whether the general term was right in holding that the court at circuit erred on questions of fact, is open, on appeal, to the consideration of the court of appeals.

In *Van Tassel v. Wood*, *ante*, it was held that, where in an order of general term, reversing a judgment entered upon a decision of the court on trial without a jury, it is not stated that the reversal was upon questions of fact, the reversal in order to be sustained in the court of appeals, must be justified by some error of law, and the opinion cannot be looked to in order to ascertain the ground of the reversal; if upon the facts, it must appear in the body of the order.

It was held, in *Guernsey v. Miller*, 80 N. Y. 181, that, though an appeal from the judgment of the general term is first perfected to the court of appeals, the supreme court has power to amend its record by conforming the order to the fact, and therein stating that its decision was made upon questions of fact, and its determination in that respect is not the subject of review. See *Buckingham v. Dickinson*, 54 N. Y. 682.

In *Clarke v. Lourie*, 82 N. Y. 580, it was held that where the order appealed from states no ground for the decision, the opinion of the court cannot be resorted to for the purpose of determining the reasons upon which it is based; and that, unless the contrary appears, it must necessarily be assumed that the order was made in the exercise of the discretion of the court which granted it.

In *Shultz v. Hoagland*, 85 N. Y. 464, the validity of a general assignment made for the benefit of creditors, was assailed upon the ground of fraud. The special term upheld it, as honest and fair, because not satisfied from the evidence that it was executed with an intent to hinder, delay or defraud the creditors of the assignor; but upon appeal, the general term reversed this decision, having reached an opposite conclusion upon the question of fraudulent intent. The reversal by the latter court was certified to have been upon questions of fact, as well as upon questions of law, and it was held, on appeal to the court of appeals, that the inquiry, whether this assignment was proved to have been made with an actual fraudulent intent, is open to review in the latter court, unrestrained even by the findings of the trial judge. See also *Godfrey v. Moser*, 66 N. Y. 250.

In *The Rider Life Raft Co. v. Roach*, 97 N. Y. 373, it was stated that the rule undoubtedly is that, unless otherwise appearing, the court of appeals will assume the order to have been granted upon questions of law, and these only can be considered on appeal. If the court below was influ-

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enced in its determination by questions of fact, and it was material to the defendant to make this apparent, he should have seen to it, that the order showed that the reversal was upon the facts. In case he fails to do this, he is not in a position to claim that a new trial should be denied upon grounds remote from the merits of the controversy which he is prevented from urging by reason of the silence of the order.

In *Nicholls v. Wentworth*, 100 N. Y. 456, the general term reversed a judgment awarding a perpetual injunction against the defendant from obstructing a certain alley, upon the ground that the evidence did not authorize the finding made by the prior court, that the use of the alley by the plaintiff and her grantors had for a period of more than twenty years been open, notorious and well known, under a claim of right, and adverse to the exclusive ownership of any part thereof by the defendant. And it was held that the order of reversal, as it does not specify that it was made upon questions of fact, must be deemed to have been made upon questions of law. Section 1338, Code Civ. Pro.; *Davis v. Leopold*, 87 N. Y. 620; *Rider L. R. Co. v. Roach*, *ante*. The only question, in such case for the consideration of the court of appeals is, whether there was sufficient evidence to support the finding of the trial court, and the legal conclusions predicated thereon, that such a user will establish a right in one party, to an easement in the land of another, if continued for a sufficient length of time.

Where the reversal of a judgment in favor of plaintiff, entered upon trial by the court without a jury, is upon the law only, the court of appeals does not have to deal with the weight of the evidence, but simply to determine whether there is any evidence which authorized the findings of the essential facts. N. Y. etc., *Ferry Co. v. Moore*, 102 N. Y. 667.

In *Lewis v. Barton*, 106 N. Y. 70, it was held that, though it appears by the opinion of the general term that a judgment in an action tried by the court was reversed upon the facts, yet, if this does not appear in the order of reversal, the court of appeals is bound to presume that the reversal was upon questions of law only.

The action in *Prosser v. The First Nat. Bank of Buffalo*, reported above, came to trial before a judge and jury, and questions of fact were submitted to the jury. The trial judge subsequently heard further evidence, and filed his decision containing findings of fact and of law. A motion for a new trial was afterwards brought on, heard and decided, and thereafter judgment was entered, dismissing plaintiff's complaint. From this judgment, plaintiff appealed to the general term, and there the judgment was reversed and a new trial ordered. The order of reversal does not specify that the reversal was upon questions of fact, and upon an appeal to the court of appeals, it was held that the justification of the reversal must be found in some error of law revealed by the record.

In *Lowery v. Erskine*, 113 N. Y. 52, the trial court, after a hearing, rendered judgment for the plaintiffs for a part of the property specified in the complaint, and for the defendant upon the remaining portion. The

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defendant appealed to the general term upon exceptions to the findings, from the whole and every part of such judgment, and the plaintiffs, from that part which favored the defendant. The general term, upon questions both of law and fact, reversed so much of the judgment as was in favor of the plaintiff's, ordered a new trial thereof and affirmed so much as favored the defendant. From this judgment, the plaintiffs appealed to the court of appeals upon a stipulation for judgment absolute in case of affirmance. And it was held that the general term, having authority to hear appeals, both upon the law and the facts, must be deemed to have determined upon errors of fact, if that is necessary to sustain its judgment. See § 1338, and subd. 1, § 1347, Code, Civ. Pro.; *Verplanck v. Member*, 74 N. Y. 620.

The rule governing appellant tribunals in reviewing questions of fact, is stated in *Baird v. The Mayor, etc.*, 96 N. Y. 577, to be: To justify a reversal, it must appear that such findings were against the weight of evidence, or that the proof so clearly preponderated in favor of a contrary result, that it can be said, with a reasonable degree of certainty that the trial court erred in its conclusions. See also *Lowery v. Erskine, ante*; *Crane v. Baudouine*, 56 N. Y. 256; *Westerlo v. DeWitt*, 36 Id. 344.

In *Roberts v. Tobias*, 120 N. Y. 1, an action was brought to set aside an assignment for the benefit of creditors upon the ground that it was fraudulent and void. The trial court found in favor of the plaintiffs, and, on appeal to the general term, judgment was reversed. And it was held that, if the general term had intended to place its reversal on the finding of the trial court that the assignment in question was intended to hinder, delay and defraud creditors, etc., which was not supported by the appeal book, there should have been inserted in the order a statement to the effect that the reversal was made upon questions of fact as well as law, and in the absence of such a statement, the court of appeals is required to presume that the reversal was upon questions of law only.

After the decision of the court of appeals was announced, the general term made an order amending its order reversing the judgment, so as to state that it was reversed upon questions of fact, as provided by § 1338, Code Civ. Pro., after which an application was made to the court of appeals for a reargument, which was granted. See 120 N. Y. 665. And it was held that, as it now appears that the reversal of the general term was made upon the question of fact, the order should be affirmed, and judgment absolute ordered for the respondents upon the stipulation.

In trials by referee.—In *Thompson v. Menck*, 2 Keyes, 82, it was not stated in the judgment or order of reversal of the general term, that the judgment on the report of the referee was reversed on the questions of fact. This case was decided under the former Code, and § 268 of that Code declared that it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal. And it was held that

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the court of appeals could not avoid this statute, how much soever it might be impressed with the injustice of the finding of the facts below. This court has held so distinctly in a number of cases, and have denied motions for leave to send the case back that the court below might amend its judgment or order, by reversing the findings of fact. Such motions were made upon the ground that, from the opinion of the general term, it was clear that the court intended to reverse the facts, but that the order of reversal failed to express that intent. Though, in looking at the evidence, the court of appeals might wish that the referee had found some of the facts otherwise than he did, and though the general term, by an exercise of its power, might have reversed these findings of fact if contrary to its judgment, the court of appeals cannot do so; it cannot repeal the statute in order to work out justice in that way.

In *Petersen v. Rawson*, 34 N. Y. 370, the case was referred and judgment entered upon the referee's report in favor of plaintiff. On an appeal to the general term, it is recited in the order of reversal, that this judgment, was reversed upon questions of fact. The plaintiff appeals to the court of appeals from this judgment of the general term. And it was *held* that, if the judgment is reversed at the general term, and a new trial ordered, it shall not be deemed to have been reversed upon questions of fact, unless so stated in the judgment of reversal; and, in that case, the question whether the judgment should have been reversed, either upon questions of fact or of law, shall be open to review in the court of appeals. The whole case upon the facts is presented to this court for review, and it is to determine whether the judgment should have been reversed upon the questions of fact.

In *Westerlo v. De Witt*, *ante*, a majority of the judges of the general term, in examining the evidence, took a different view of the facts and of the law from that taken by the referee, while a minority concurred with him in both respects. And it was *held*, on appeal to the court of appeals, that the question was before this court, as an original question, and in the same manner that it was before the general term. This is not precisely the same question as though the appellate court was inquired of whether it should have found the same facts and have determined the law in the same manner. But it is, rather, is it so certain that the referee was in error upon the facts, that it will assume to reverse his judgment? If the case is doubtful, his conclusions should not be reversed. If this court, upon reading the evidence, should be of the opinion that the conclusion might well have been either way, then the fact that the referee saw the witnesses, heard them testify, and had the nameless opportunities of judging of their character that personal acquaintance alone can give, should induce the appellate court to defer to his judgment. But if, upon the other hand, the court is clearly of the opinion that the referee erred in deciding the facts, it is bound to reverse his judgment. See also *Ball v. Loomis*, 29 N. Y. 412; *Petersen v. Rawson*, *ante*.

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In *Baldwin v. Van Deusen*, 37 N. Y. 487, the case came before the court of appeals upon an appeal by the plaintiff from an order of the general term reversing a judgment in his favor, entered upon the report of the referee and ordering a new trial. The order of the general term failed to show that it was based upon questions of fact. And it was held that it must, therefore, be assumed in the court of appeals to have been made upon questions of law arising upon exceptions taken by the respondent upon trial, or to the report of the referee as made.

Where the judgment of reversal does not state that the reversal was made upon questions of fact, it must not be deemed to have been reversed on questions of fact, but the court of appeals must consider the decision of the general term, reversing the judgment of the referee, as involving a question of law alone. *Van Blarcom v. The Broadway Bank*, 37 N. Y. 540.

In *Colwell v. Lawrence*, 38 N. Y. 71, it was held that questions of fact, on affirmance below, are not properly before the court of appeals, and the appellants cannot urge that the report of the referee was erroneous as to the facts. See also *Metcalf v. Mattison*, 32 N. Y. 464; *Loty v. Carolus*, 31 Id. 547; *Wilcox v. Hawley*, Id. 648; *Petersen v. Rawson*, *ante*. The findings of fact by a referee are not the subject of review in the court of appeals, except where the supreme court has reversed a judgment upon questions of fact, and so stated in its order; it is, in such case, upon appeal, brought within the jurisdiction of the former court.

In *Smith v. Aetna Life Ins. Co.* 49 N. Y. 211, it was held to be the duty of the general term of the supreme court to set aside a referee's report which is against the clear weight of evidence; and that, where a judgment has been reversed, and a new trial granted by that court upon the facts, the court of appeals occupies the same position, and the facts are open for review.

In *Kirkland v. Leary*, 50 N. Y. 678, it was held that resort cannot be had to the opinion of the general term to determine whether a new trial was granted upon questions of law or fact.

In *Sheldon v. Sheldon*, 51 N. Y. 354, the order of the general term did not state that the reversal was on questions of fact, and it was held that the reversal must be deemed to have been on questions of law. It does not matter that the opinion given at general term shows that the reversal was on questions of fact, so long as it does not appear in the order of judgment of said court. In such case the court of appeals, on the appeal, can review only questions of law, and can look into the case only for the purpose of seeing whether any error of law was committed. But if the referee has found any material fact wholly without evidence, or against the undisputed evidence, then he has committed an error of law which is reviewable in the court of appeals. See also *Draper v. Stouvenal*, 38 N. Y. 219; *Fellows v. Northrup*, 39 Id. 117; *Mason v. Lord*, 40 Id. 476.

In *Crane v. Baudouine*, *ante*, an appeal to the court of appeals was taken

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from an order of the general term, reversing the judgment of the referee and ordering a new trial. The order of the general term stated that the judgment of the referee was reversed upon questions of fact, and it is apparent from the case, that it was reversed upon questions of fact alone. In such case, the question is open for review in the court of appeals. It is not the same question as though the latter court should inquire whether it would have found the same facts in the same way as did the referee. It is, rather, is the court so certain that the referee was in error, upon the facts, as that it will assume to reverse his judgment? If it appears that his conclusion is not against the weight of evidence, that it might have been either way, or that the testimony is slight on which to found a conclusion contrary to his, then the consideration that he saw the witnesses, and had the assistance of their presence before him, uttering orally to him their testimony, should lead to a deference to his judgment. See *Westerlo v. De Witt*, *ante*.

In *Johnson v. Youngs*, 65 N. Y. 599, the referee made a report finding the existence of the partnership substantially as alleged in the complaint and directing an accounting. Defendant moved on a case to set aside the report and for a new trial. The motion was granted. The order of the general term stated that the facts proved were insufficient to establish the partnership, and that the exceptions to the findings of fact on the ground that the same were unsupported by the evidence, were well taken, and it was held that the motion was properly made under § 268 of the former Code, as amended in 1867; and that an appeal from the order of the general term was properly taken under said section, and that under the order every question of fact and law was open for the consideration of the court of appeals.

In *Godfrey v. Moser*, 66 N. Y. 250, it was held that, in reviewing a decision of the general term reversing a judgment entered upon the report of a referee, where it is certified that the order of reversal was made upon questions of fact as well as law, the court of appeals occupies the position of the general term as to the facts as well as the law. When such review is proper, it is the duty of the appellate court to pass upon the facts from the evidence, and, in this respect, the duty is different from what it is in reviewing a judgment entered upon the verdict of a jury. In the latter case, the right of reviewing the facts is not conferred, and to reverse upon the facts, there must be an absence of any evidence to sustain the verdict; so in the court of appeals, in reviewing a judgment entered upon the report of a referee, in the absence of such certificate, the finding of facts is conclusive, if sustained by any version of the evidence which the referee was authorized to give it. In reviewing the facts, proper deference should be awarded to the judgment of the referee in cases of serious doubt, upon conflicting evidence, especially when it is probable that the appearance of the witnesses, or their manner of testifying, was, or might have been, controlling in determining the questions; but these cases are rare, and, in general,

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it is the duty of the appellate court to take the responsibility of examining the evidence and determining the facts for itself.

Upon a subsequent motion for a reargument of this case in the court of appeals, it was held by that court that there has never been any doubt that the general term has a right, and that it is its duty, to consider the facts in such a case, and pass upon them; and, when the general term certifies that the reversal is upon questions of fact, such questions are open to review in the court of appeals.

In *Verplanck v. Member*, 74 N. Y. 620, it was held that the legal assumption is that the general term, on appeal from a judgment entered upon the report of a referee, considers and reviews the facts; and to rebut this presumption, so as to present the point on appeal to the court of appeals that the general term refused so to do, the refusal must clearly appear by the record, and the opinion of the general term is not conclusive on this subject.

In *Weyer v. Beach*, *ante*, in the opinion at general term, the reversal of the judgment was placed upon two grounds, one of which was that it disagreed with the referee as to the facts, and was of opinion that the evidence established an agreement by the respondent to become surety for the contractors for such sums as they might owe the claimants for brick furnished, and that his undertaking, not being in writing, was void by the statute of frauds. The order of reversal, however, did not state that it was made on questions of fact, and it must, therefore, pursuant to § 1338 of the Code, be deemed to have been made, not on any question of fact, but on questions of law only. And it was held that the respondent could not, consequently, avail himself of the view of the facts taken by the court at general term, but must abide by the findings of the referee, in case they have some evidence to support them.

In *Davis v. Leopold*, *ante*, it was held that, where the facts found by the referee justified the relief sought, and it does not appear that the judgment entered by his direction was reversed by the general term upon questions of fact, the court of appeals has only to inquire whether it rests upon any error in law.

In *Sherwood v. Hauser*, 94 N. Y. 626, the general term reversed the decision of a referee upon questions of fact, and an appeal was taken to the court of appeals to review the determination of the former court. And it was held that it was the duty of the court of appeals to examine the whole evidence, and judge for itself whether the evidence has sufficient force to uphold the appellant's allegations; and if it has, or if the evidence, as it appears upon the record, is balanced, and the court can see that inferences drawn from the appearance of the witnesses and their manner of testifying, might turn the scale toward the fact testified to, it may assume that there were circumstances of that kind proper for the consideration of the referee, and that they affected his determination as to the degree of credit which should be given to them. In either case, his conclusion should

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stand; for, in neither event, could it be said to be manifestly against or contrary to evidence. See also *Godfrey v. Moser, ante*; *Westerlo v. De Witt, ante*; *Crane v. Baudouline, ante*.

Where the order of the general term states that the judgment entered upon the report of the referee was reversed, both upon the law and the facts, the case is free from doubt upon the appeal; but where the reversal is for error of law only, the evidence must be carefully scrutinized to see if there was any which in law was sufficient to sustain the judgment. *Kane v. Cortesy*, 100 N. Y. 132.

In *Holcombe v. Munson*, 103 N. Y. 682, the referee found upon each of the questions mainly litigated in favor of the plaintiff, and, from the judgment entered upon his report, the defendants appealed to the general term. This court, after an examination of the evidence in the case, came to the conclusion, that the referee erred upon the facts in ordering judgment for the plaintiff. Instead, however, of determining the case upon this ground, its decision was placed, as shown in the order of reversal, upon questions of law alone; and it reversed the judgment and directed a new trial. The plaintiff appealed to the court of appeals, giving the usual stipulation for judgment absolute. And it was held that the decision of the general term precluded the court of appeals from reviewing the case upon the facts and confined it to the examination and decision of the questions of law presented by the record. The court said that, in view of the repeated warnings given by it of the hazard incurred by a party in taking such course, of encountering some objections and exceptions taken on the trial, but not considered by the general term, which might prove to have been well taken, and especially in a case that bristles with exceptions, it was, to say the least, quite dangerous to risk the chances of an affirmance by the court for such errors. See also *Cobb v. Hatfield*, 46 N. Y. 533; *People v. Super. of Essex Co.*, 70 Id. 228; *Mackey v. Lewis*, 73 Id. 382.

Upon such an appeal, it is the duty of the court of appeals to examine the whole record, for the purpose of discovering whether there were any errors committed by the trial court, which would have authorized an order of reversal by the general term; and, if such are found, it is the imperative duty of this court to affirm the order appealed from and order judgment absolute for the respondent. *Id.*

In *Inglehart v. Thousand Island Hotel Co.*, 109 N. Y. 454, the general term reversed the judgment, but did not declare in its order that the reversal was upon the facts; and it was held that the court of appeals must assume that the reversal was for error in law; §§ 1337, 1338, Code Civ. Pro.; *Kane v. Cortesy, ante*, and cannot go to the opinion to ascertain *Van Tassel v. Wood, ante*.

In jury trials.—In *East River Bank v. Kennedy*, 4 Keyes, 279, it was held that, if a judgment rendered on the trial of an action by the court without a jury, or by a referee, is reversed in general term, such reversal is to be deemed made upon questions of law, unless it appears in the order of

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reversal that it was made on questions of fact; and that, when it does not so appear, the review in the court of appeals is confined to questions of law raised on the trial and made the subject of exception. This case was decided under the former Code; and §§ 268, 272, of that Code were held to have no application to an order reversing an order of the special term, setting aside a verdict, and ordering a new trial after a trial by jury.

Prior to 1851, the decisions were uniform, not only that an order granting a new trial was not final and, therefore, not appealable to the court of appeals, but also that the court of appeals, in cases of appeals from judgments on reports of referees, had no jurisdiction to review questions of fact upon a case, though sought by appeal from the judgment.

In 1851, the former Code was so amended as to allow an appeal to the court of appeals from an order granting a new trial; and this court held, in *Moore v. Westervelt*, 1 Code R. N. S. 415, that this amendment did not include new trials upon a case involving questions of fact, but only where questions of law are involved in such order.

In 1852, this amendment, in the particular mentioned, was repealed. But in 1857, this section was again amended so as to give an appeal from an order granting a new trial; and in 1862, it was extended so as to embrace an order refusing a new trial. But, according to the decision in *Moore v. Westervelt*, *ante*, this did not bring under review questions of fact, as upon a case, such as that the verdict is against the weight of the evidence, or where the motion is founded upon alleged surprise or newly discovered evidence, but on questions of law only.

The general policy of the legislature, in leaving questions of fact to be settled by the courts of original jurisdiction, and giving an appeal to the court of appeals where the rules of law are claimed to have been erroneously determined, is departed from in two instances only, viz., where a cause is tried by the court or by a referee, and a reversal is ordered upon questions of fact; but in these cases the review of the facts do not extend to cases tried by a jury.

The court practice, under the former Code, may be stated thus: When the court below sets aside a verdict and grants a new trial, on the ground that the verdict is against evidence or is unsatisfactory, or on the grounds of surprise or of newly discovered evidence, or for other reasons resting in the facts only, or in the discretion of the court to grant a new trial, the order is not reviewable in the court of appeals in any form, and should state that it is granted upon questions of fact, or, in some form it should so appear clearly by the record. Where the verdict is set aside and a new trial is ordered for errors in law, the court of appeals has jurisdiction to review the order, upon the appellant's giving the proper stipulation and consenting to final judgment in case the order is affirmed. Where the record does not, in some form, show that the order for a new trial was based upon questions of fact, it must be assumed, in the court of appeals, that the order was granted for errors in law committed at the trial, and if

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the court finds no such errors, the order must be reversed. Where the appeal is from an order refusing a new trial, questions of law only can arise on the hearing of the appeal.

In the cases of *Hoyt v. Thompson's Ex'rs*, 19 N. Y. 208, and *Miller v. Schuyler*, 20 Id. 522, it was held that, unless the case was such as to negative any inference that the new trial was granted on questions of fact, an appeal from the order presented no question of law for adjudication by the court of appeals. But these decisions were made before the amendment of 1860, allowing a review in this court upon the facts in cases tried before the court or a referee, and are no longer applicable to that class of cases; but they are applicable to cases tried by jury, as the law in respect to them remains the same as when these decisions were rendered.

Prior to the year 1860, decisions of the general term granting or refusing new trials upon questions of fact, were not reviewable in any case in the court of appeals. But in that year a provision was inserted in § 268 of the former Code, relative only to cases tried by the court, that if the judgment is reversed at general term on questions of fact, the question whether it should have been reversed, either on questions of fact or law, should be open to review in the court of appeals. And it was also enacted in the same clause, that if the judgment is reversed at general term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal. *Wright v. Hunter*, 46 N. Y. 409.

The same provisions were, by § 272 of the former Code, applied to cases tried by a referee.

But there was no provision in the former Code for the review, in the court of appeals, of an order of the general term granting a new trial upon questions of fact, where the case was tried by a jury. The general provision of § 11 of that Code, authorizing appeals from orders granting new trials, was not construed as entitling the appellant to a review in the former court of the decision of the general term upon questions of fact, except in cases tried before the court of a referee. *Id. Young v. Davis*, 30 N. Y. 134.

In cases tried before the court or a referee, there was no difficulty in determining whether the new trial, granted at general term, was granted on questions of law or of fact, for §§ 260 and 272 of the former Code provided that the judgment shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal.

But these sections were not applicable to cases tried by a jury, and the court of appeals was compelled to look at the return in such cases for the purpose of determining whether the judgment was, or may have been, reversed as questions of fact.

The appellant must show that the granting of a new trial was erroneous in matter of law; and if it appears by the return that exceptions were taken at the time, and that there was no substantial conflict as to the facts, or that no application for a new trial was made to the judge at circuit, or to the special term, the court of appeals is justified in assuming that the gen-

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eral term passed exclusively upon questions of law, as no others had been properly before them, and will review those questions. But where the return shows that questions of fact were legitimately before the general term, and that the evidence was such that the court may have reversed the judgment on the facts, it is impossible to say, from an inspection of the record, that it committed an error of law in granting a new trial, though the court of appeals should be of opinion that none of the exceptions were well taken.

The respondent should not be deprived of the new trial he has obtained, on account of his failure to obtain an entry of the grounds of the decision in the judgment of reversal, as there is no statute requiring or authorizing such entry to be made.

Where there is a substantial conflict in the testimony, and a motion for a new trial, has been made at special term, or to the judge at circuit, and denied, and an appeal from that order taken to the general term, the question of the weight of evidence is properly before the general term; and though there are also exceptions in the case, it is impossible to determine from the record that the new trial was granted upon the exceptions alone; and the appellant, in such a case, fails to show that the general term has committed an error of law in granting the new trial. If the new trial is granted upon the evidence where the trial has been by jury, the decision of the general term is not reviewable in the court of appeals. *Wright v. Hunter, ante*; *Young v. Davis, ante*.

In *Sands v. Crooke*, 46 N. Y. 564, a motion for a new trial upon the evidence, and upon exceptions, was made to the judge at circuit and denied, and judgment was thereupon entered upon the verdict. An appeal from that judgment, and also from the order denying a new trial, was taken to the general term, and was heard upon a case containing the evidence, as well as the exceptions taken at the trial. The general term reversed the judgment and granted a new trial. An appeal to the court of appeals from the order granting a new trial was brought upon the assumption that §§ 268 and 272 of the former Code, which provided that a judgment shall not be deemed to have been reversed on questions of fact, unless so stated in the order of reversal, applied to cases tried by jury. But it was held that these sections applied only to cases tried by the court or a referee, and that, in cases tried by a jury, where a new trial is granted at general term, the court of appeals will not entertain an appeal from the order granting a new trial, if it appears from the return that such order was, or may have been, made upon questions of fact.

In *Downing v. Kelly*, 48 N. Y. 433, it was held that, where it is shown by the order itself that the new trial was granted on questions of fact as well as of law, it is not reviewable by the court of appeals for the purpose of reversing it. Where, in a case tried before a jury, the judgment has been reversed and a new trial granted upon questions of fact, and the proceedings have been regular, and appeal will not lie to this court. The

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return made to the appellate court must be examined for the purpose of determining whether the judgment was, or may have been, reversed on questions of fact. If the record shows that questions of fact were properly before the general term for decision on the appeal to it, and that the order for a new trial may, or could, have been based thereon, then the court of appeals will not review it for the purpose of reversal; or, in other words, it is necessary, to sustain the appeal to this court from such an order, for such a purpose, that it shall appear by the record to have been founded on questions of law only. This court is not limited or restricted in the review of the case, on the appeal, to the grounds or reasons assigned in the opinion of the court below for the decision made by it.

Where there is a substantial conflict in the testimony, and a motion for a new trial upon the evidence has been made at special term, or to the judge at circuit, and denied, and an appeal from that order taken to the general term, the question of the weight of evidence is properly before the general term; and though there are also exceptions in the case, it is impossible to determine from the record that the new trial was granted upon the exception alone. In such case, the appellant on an appeal to the court of appeals fails to show that the general term has committed an error of law in granting a new trial; for, if granted upon the evidence in a jury trial, its decision is not reviewable in the court of appeals.

In *Harris v. Burdett*, 73 N. Y. 136, the defendants moved upon the minutes for a new trial, on the ground of the insufficiency of the evidence. The motion was denied, and judgment entered on the verdict, and an appeal taken to the general term from the order denying a new trial, and also from the judgment. On these appeals, the general term reversed the judgment and ordered a new trial, and inserted in its order of reversal a statement that the reversal was on questions of law solely. The plaintiffs appealed to the court of appeals, and the defendants moved to dismiss the appeal. And it was held that an appeal to this court will not be entertained where the court below has ordered a new trial in a case tried by jury, if any material and controverted question of fact was involved, and the general term granted, or might have granted, the new trial on such question of fact.

The appealability of the order depends upon the question whether the new trial was actually granted upon questions of fact or of law, and the declaration of the court below that its decision was based upon questions of law only is not sufficient to render the case appealable. *Id.* The court of appeals will not regard the opinion as conclusive, inasmuch as the result may have been concurred in by some of the judges on their view of the facts, and there is no authority of law for inserting the ground of reversal in the order, as in the case of trials before the court or a referee. It is incumbent upon the appellant to show error in the decision appealed from, and an order granting a new trial is not shown to be erroneous by showing that there was no valid exception in the case, provided it was in such a condition that the general term could have reversed upon the facts.

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Though the general term does actually grant the new trial on a question of law, and this can be made conclusively to appear; yet, if the case comes before the general term in such form, and the character of the evidence is such, that a new trial may have been granted on questions of fact, the order is not, and should not be appealable to the court of appeals. To hold otherwise may result in entirely depriving the party, against whom the judgment was rendered, of the review at general term upon the facts, to which the law entitles him.

In case the court of appeals should differ with the general term upon the question of law on which its order for a new trial was founded, and should reverse the order, the consequence would be an affirmance of the judgment entered on the verdict, and in that event the respondent would have a final judgment against him, without having had any review of the verdict by the general term upon the evidence, notwithstanding that the law gives him the right to such review, and he has taken all the steps required to obtain it.

By an appeal from the order denying the motion for a new trial on the minutes, the questions of fact are brought legitimately before the general term, and it must be presumed that it would have passed upon them, had it not been of opinion that the point of law required a reversal of the judgment. If the court of appeals, under such circumstances, should finally dispose of cases on appeal from orders granting new trials, a mistake by a general term, in respect to a question of law, would result in entirely depriving the party, against whom the judgment was rendered, of any review of the verdict upon the evidence. For these reasons the court of appeals has declined to entertain such appeals. Though the latter court could hear the appeal, and if it overruled the point of law upon which the new trial was granted, the case might be sent back to be reheard at general term upon the facts; yet, there is no precedent for such a practice.

Where exceptions have been taken, and a motion for a new trial has also been made upon the minutes or at special term, the unsuccessful party may waive any further review upon the facts, and appeal to the general term from the judgment; and this appeal will bring up the exceptions only. Or, where an appeal is taken from the order refusing a new trial, as well as from the judgment, the general term may reverse the judgment upon the exceptions, and at the same time affirm the order refusing a new trial upon the facts. In either of these cases, the order of the general term is appealable to the court of appeals. But in no others will such an appeal lie where the trial has been by jury, if controverted and material questions of fact are involved, and a motion for a new trial has been made on the evidence.

The inconvenience and expense of going back for a new trial, when the result may ultimately depend upon a question of law, are not nearly so great a hardship as would be inflicted by rendering a final judgment against a party, upon a verdict which may have been rendered contrary to the

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weight of evidence, and which would have been set aside by the court at general term, had it not rested its order granting a new trial upon an erroneous view of the law. The purpose of the amendment of 1857 to the former Code was to obviate this inconvenience; but the right of appeal was confined to cases depending wholly upon questions of law, except where the trial was before a court or referee. The court of appeals cannot extend it to cases tried before a jury, where questions of fact, as well as law, are involved.

Where, on the trial the case is submitted to the jury, and determined on a controverted question of fact, and where, even if the general term is of opinion that the verdict on that question was against the weight of the evidence, the plaintiffs are, nevertheless, entitled to judgment upon the uncontroverted facts, unless the decision of the general term upon the question of law can be sustained, the order is appealable, for then no material question of fact is involved, and a new trial will be of no avail, as the result will depend wholly upon the question of law.

In *Snebley v. Conner*, 78 N. Y. 218, the case was submitted to the jury upon conflicting evidence and they found a verdict for the plaintiff. The defendant then made a motion for a new trial on the minutes of the judge, and the motion was denied, and a formal order to that effect was entered. Judgment was then entered upon the verdict for the plaintiff, and the defendant appealed from both the judgment and order to the general term, and it reversed both and granted a new trial. The plaintiff then appealed to the court of appeals from the order of the general term, stipulating for judgment absolute against him in case of affirmance of the order; and, upon appeal from such order, it was held that, as the practice in such cases had become thoroughly established and known, the order should be affirmed in accordance with the stipulation in the notice of appeal, instead of the appeal being dismissed; and that the opinion of the general term cannot be looked to for the reason or grounds of its decision.

In *Goodwin v. Conklin*, 85 N. Y. 21, it was held that, in cases tried by jury, there is no necessity that the order of reversal should state whether it was made on questions of law or fact. Where the facts are properly before the general term for review it has the power to reverse the judgment and order a new trial upon the evidence; and if it had made the order in this form, its decision would not have been reviewable in the court of appeals. Where the general term omits to order a new trial, its order is in substance an absolute and final reversal of the judgment.

But whether the reversal is founded upon the questions of fact or of law involved, it is a case for a new trial, and not for a final judgment, where the appellate court cannot say that, under the pleadings, it will be impossible to present evidence which will require the submission of the claim to the jury. It does not follow, however, that because the general term went too far in awarding final judgment, its order should be wholly vacated, and the original judgment restored. It would be a proper case for awarding a

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new trial on the issue, and the proper course, in such a case, is to modify the order accordingly.

In *Pharis v. Gere*, 107 N. Y. 231, several questions of fact were litigated upon the trial and submitted to the jury, and they rendered a verdict in favor of the plaintiff. The defendant made a motion for a new trial upon the minutes of the trial judge, which was denied. Subsequently a judgment was entered upon the verdict, and then the defendant appealed from the order denying the motion for a new trial and from the judgment to the general term, where both the order and the judgment were reversed and a new trial granted. The plaintiff then appealed to the court of appeals giving the usual stipulation.

The appellant, while conceding that this court has no jurisdiction to hear the appeal, provided the general term may have granted the new trial upon a question of fact, claimed that this case was not so before the general term, that it could reverse the order and judgment upon a question of fact; but in this the court of appeals was constrained to differ with him. It is not required that written notice of the motion for a new trial upon the judge's minutes should be given. It may be brought on immediately after the rendition of the verdict without any previous notice. But it can be based only upon one of the grounds mentioned in section 999 of the Code, and must be heard upon the minutes only. In the argument of the motion, the ground upon which it is based will necessarily be disclosed and the order entered upon the motion should, with propriety, always state the ground or grounds upon which the motion was made. If it does not, and the order is one denying a motion for a new trial, and an appeal is taken therefrom to the general term, it will usually be impossible for the appellate court to know upon what ground the motion for a new trial was based, and what questions were before the trial judge for consideration. But there is no reason why the general term may not entertain such an appeal, and, when it does, and the questions are argued and submitted to it for determination, and it reverses the order and grants a new trial, a different state of things exists. Then it will be assumed that its order was based upon some one of the grounds mentioned in § 999, and, where the case presented disputed questions of fact, it cannot be said that the reversal was not upon a question of fact. Consequently, upon an appeal from such an order to the court of appeals, as the reversal may have been upon a question of fact, there is nothing for the court to review. It is sufficient to render it impossible for said court to consider the appeal that the general term may, upon a question of fact, have reversed the order and granted a new trial.

In *Pharis v. Gere*, on a subsequent appeal to the court of appeals, 112 N. Y. 408, the judgment was reversed after verdict, on an appeal taken to the general term, and an order made awarding a new trial, and from that decision an appeal was taken to the court of appeals, and it was held that, while an appeal cannot be taken from the mere judgment of reversal, where

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It is accompanied by an award of a new trial, there can be an appeal taken from that order, and on that appeal the judgment of reversal must be reviewed. Where, on an appeal from the order of the general term granting a new trial, the stipulation required in such case by § 191 of the Code is duly executed, the court of appeals is enabled to review the order for a new trial, and, at the same time, the judgment of reversal of which it is the necessary and logical consequence. The appeal from the order, explicitly permitted by the Code, gives jurisdiction, and the court of appeals, having obtained jurisdiction, is required to extend its review to the judgment of reversal. While the latter cannot be appealed from, it can be reviewed on the appeal from the order. The decision of the general term, under the distinction of the Code, is not a single, but a compound thing. It consists both of a judgment and an order, viz.: a judgment of reversal, and an order for a new trial. The latter may be, but the former cannot be appealed from.

Where the record to the court of appeals shows an appeal from the order, as well as from the judgment, of the trial court, and the court of appeals cannot say that the reversal might not have been made upon the facts, it will dismiss the appeal, unless the difficulty, by an amendment, is removed. If the general term makes that amendment, and changes its order so as to show a dismissal of the appeal from the order refusing a new trial, there is nothing left to the court of appeals but a reversal and order for new trial founded upon errors of law.

In *Boyle v. N. Y. L. E. & W. R. R. Co.*, decided in court of appeals, June 4, 1889, 115 N. Y. 636, the plaintiff recovered a verdict at the circuit. The defendant then made a motion for a new trial upon the minutes of the trial judge, under § 999, Code Civ. Pro., on the ground that the verdict was contrary to the evidence. This motion was denied, and the judgment entered upon the verdict. The defendant then appealed to the general term, both from the judgment and the order denying the motion for a new trial, and this court reversed both the judgment and the order and granted a new trial solely, as stated in its order, upon questions of fact. The plaintiff appealed to the court of appeals, giving stipulation for judgment absolute in favor of the defendant, in case the order should be affirmed. And it was held that this appeal clearly brought nothing up for review, and the court of appeals, instead of dismissing the appeal, affirmed the order of the general term.

In surrogate proceedings.—In *Matter of Cottrell*, 95 N. Y. 329, it was held that, in reviewing questions arising on appeals from surrogates' courts in cases commenced therein previous to September 1, 1880, when the last seven chapters of the Code of Civil Procedure went into effect, the court of appeals is precluded, by § 1837 of that Code, from re-examining the conclusions of fact reached by the court below, except in cases where the supreme court has reversed their judgments upon such questions, and so certified in their order of reversal. See § 1838.

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Previous to the adoption of that section, appeals from the decrees of surrogates brought up for review, by the appellate tribunals, all of the questions, whether of fact or law, which were determined in the court of original jurisdiction.

Such appeals are now to be determined in the court of appeals solely upon the questions of law presented, except in the special case above mentioned. See also *Matter of Ross*, 87 N. Y. 514; *Davis v. Clark*, Id. 623.

In these as in other appeals to the court of appeals, it will look into the evidence given on the trial only for the purpose of seeing whether there is competent evidence to support the conclusions of fact found by the trial court, and if it finds such evidence, it is concluded by such findings.

The court, in *Matter of Haxtun*, 102 N. Y. 157, held that the court of appeals must assume that the decree of a surrogate was reversed by the general term for errors of law, when the order of reversal does not certify that it was based upon errors of fact. § 1337, Code Civ. Pro.; *Matter of Cottrell*, *ante*.

Orders.—In *Williams v. Hernon*, 8 Keyes, 90, it was held that the provision of the Code, that a judgment, reversed at a general term, shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal, does not apply to orders made on special motion upon affidavits.

JACOB MORRIS, Respondent, v. THE NEW YORK CENTRAL
AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Court of Appeals, October 4, 1887.

Reversing same case, 36 Hun, 647, Mem.

1. *Negligence. Parcels in rack.*—A railroad company, in looking out for dangers arising from the placing of packages in the car-rack by passengers, is not to be held to the exercise of the highest care which human vigilance can give; reasonable care, to be measured by the circumstances surrounding each case is all that is demanded.
2. *Same.*—Where there is nothing extraordinary about the parcel or its position in the rack, and nothing to attract particular attention to it, the failure of the train hands to notice it, or, if noticed, to order its removal, is not negligence.

Action brought to recover damages alleged to have been sustained by plaintiff when a passenger upon defendant's road, in consequence of the falling upon him of a clothes wringer which had been placed by another passenger in a rack over plaintiff's seat.

Appeal from a judgment of the general term of the supreme court, affirming a judgment, and an order denying a new trial.

Matthew Hale, for appellant.

Andrew Hamilton, for respondent.

PECKHAM, J.—The learned judge in submitting this case to the jury, instructed them that there was no evidence upon which they could find that the car or the rack therein was insufficient, and that there was no negligence upon the part of the defendant in receiving the clothes wringer in the car, nor was there evidence that any employee of defendant

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saw the wringer put in the rack or knew of its being so put in, and that the defendants were not guilty of negligence in permitting the wringer to be put in the rack. In this, we think he was entirely right. He, however, did submit one question for the determination of the jury, and in the following language: "The wringer which has been described to you was in this rack. Was it an article which was in secure to be so placed, and was it calculated to endanger the safety of the passenger who took his seat in the vicinity of this wringer? The second question, and perhaps the one which is the more important, is whether the wringer was so wrapped and enveloped as to conceal the real character of the wringer from the ordinary careful inspection of the employee of the railroad. The railroad corporation, as I regard the law, would not be liable even although an article not strictly baggage should be placed in one of these receptacles, provided the corporation had no notice of the character of the objectionable article, and providing also that there was nothing in the appearance of the parcel to indicate, upon proper inspection by the employees, the character of the article concealed in the package. Was it so bound and so enveloped as that the employee, in the fair and honest discharge of his duties, exercising a degree of vigilance which he ought under the circumstances in your judgment to have exercised, and was it so exposed that by passing through in the discharge of his duties there he should have observed what it was or not? It is a simple question for you to determine upon this branch of the case, whether this wringer was so enveloped as not to be obvious and discernible to the employees of the road in the honest and faithful discharge of their duty on that occasion which the law required at their hands. If it was obvious, they should have observed it; if it was not, then there was nothing which gave to them constructive notice of the existence in that wrapper of an article which was dangerous and which they were bound to remove."

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We think there was not sufficient evidence to warrant the submission of the question of defendant's negligence to the jury. It is undisputed that the parcel was to some extent wrapped up in paper, and even if only covered in the manner described by the plaintiff, its apparent character, both as to bulk and weight, was not such as reasonably to call the attention of the train hands to it, or, if noticed by them, it was not so apparently placed in a dangerous position as to demand from them an order for its removal from the rack.

In looking out for dangers arising from causes such as this, we do not think that carriers of passengers are to be held to the exercise of the highest care which human vigilance can give. That measure of care has been spoken of as due from them in the actual transportation of the passenger, and in regard to the results naturally to be apprehended from a failure to furnish safe road-beds, proper machinery, perfect cars or coaches, and things of that nature. But in regard to a danger of this kind a carrier of passengers is, we think, held to a less strict measure of vigilance. Reasonable care (to be measured by the circumstances surrounding each case) to prevent accidents of this nature is all that is demanded, and we do not think there was evidence in this case of any such lack of care on the part of the officers of the train.

From the evidence it seems to be quite clear that there was nothing extraordinary about the parcel or its position in the rack, and nothing to attract particular attention to it, and so the failure of the train hands to notice it, or, if noticed, to order its removal, was not negligence.

We think the motion for a nonsuit on this ground should have been granted, and for this reason the judgment should be reversed and a new trial ordered, costs to abide event.

All concur except DANFORTH, J., dissenting, and RAPALLO, J., absent.

**RENMAR STAAL, Respondent, v. THE GRAND STREET AND
NEWTOWN RAILROAD COMPANY, Appellant.**

Court of Appeals, October 11, 1887.

Damages. Future pecuniary loss.—In an action to recover for personal injuries caused by defendant's negligence, no damages for future pecuniary loss can be awarded, unless there is some proof of the party's circumstances and condition in life, earning power, skill and capacity.

Appeal from a judgment of the general term, affirming a judgment entered upon the verdict in favor of plaintiff, and from an order denying a motion for a new trial made on the judge's minutes.

Albert G. McDonald, for appellant.

A. Simis, Jr., for respondent.

EARL, J.—The plaintiff brought this action to recover damages for the injuries which he claimed to have sustained while alighting from one of the defendant's cars in which he was a passenger, and he recovered a judgment which has been affirmed at the general term.

This appeal brings to our attention only exceptions to the charge of the trial judge relating to the damages which the jury might award. That portion of the charge and the exceptions thereto are as follows: That the plaintiff "is entitled to recover, as damages in this action, compensation: *First*, for the pain and suffering that he has encountered; *second*, as this injury is to some extent, at least, permanent, he is entitled to compensation for the results, which will flow in the future from this injury; that is, for any suffering and inconvenience he will have in life resulting from this injury, and for pecuniary loss on account of

the injury caused by the diminution in his ability to earn a livelihood. This is no hard rule to be laid down to you in this case. You must say, under all the circumstances considering what pain he has suffered, what his loss has been, in his circumstances in life, the chances of what money he would make, and his age, considering the injury and the results of that injury, what would be a fair compensation. All that is left to the good sense of the jury."

The counsel for the defendant then excepted "to that part of your honor's charge in which you say that the jury may allow him his pecuniary losses resulting from his disabilities owing to this accident," and he requested the judge to charge that "the jury should take into consideration the great age of the plaintiff as affecting future continuance of life."

The judge replied: "I charge that; and I will say further, that in this case there is no proof of loss shown by what his income was up to that time. What the court therefore told you as to pecuniary losses was in connection with the future." To that defendant's counsel excepted, and requested the judge to charge that the jury could not "make further allowance to the plaintiff for expenses of treatment or care for the past or future."

In reference to the request, the judge said: "I charge that for the past. For future expenses the jury have a right to consider the expenses of this injury, if they find this renders the plaintiff to any extent helpless, and also to consider to what expenditures to make him comfortable he will have to go;" and to that defendant's counsel excepted.

This is the entire charge relating to the damages, and that it may be appreciated, it must be stated that immediately after the injury, the plaintiff was taken to a charity hospital, where he remained about three months; that he then went to another charity hospital, where he remained several months, and that he then went to the county alma-

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house, where he remained until the time of the trial, not having at any time been subjected to any personal expenses. There was proof that the plaintiff was a fresco painter, and that for some time before his injuries he had been employed by a person who was engaged in the business of painting.

No special damages and no pecuniary losses, past or future, were alleged in the complaint. There was no proof whatever as to the plaintiff's circumstances in life, except that before the injury his "general health was very good." There was no proof touching his age, habits, capacity, ability to work, skill in his trade, his wages or his earnings, or the compensation he was able to earn, or his chances of getting work. There was not even any proof that he had earned or that he was able to earn a livelihood.

The judge, recognizing the rule laid down in *Leeds v. The Metropolitan Gas Light Co.* (90 N. Y. 26), finally charged that the proof did not authorize the jury to award any damages for inability to work and earn wages prior to the trial. But he charged that they could allow such damages for the future—that is, that they could take into account, as a distinct item of damages, the plaintiff's pecuniary loss "on account of the injury caused by the diminution in his ability to earn a livelihood," and "the chances of what money he would make" but for the injury.

This charge was clearly in conflict with the rule laid down in the case cited. In that case we held that where loss of time is claimed as an item of damages in such a case as this, if plaintiff fails to prove the value of the time lost, or facts on which an estimate of such value can be founded, only nominal damages for that item can be given. There it was proved that the plaintiff was engaged in business at the time of the injury, and that he had not been able to attend to his business since, but it was not shown what his business was, or the value of his time, or any facts as to his occupation from which the value could be esti-

mated. The court charged that the plaintiff, if entitled to a verdict, was "entitled to recover compensation for the time lost in consequence of confinement to the house, or in consequence of his disability to labor; from the injury sustained." The charge was held to be erroneous, as the jury was left to guess at or speculate upon the value of the lost time without any basis in that respect for their judgment to rest upon. It is true that the charge there related to past loss. But if a jury cannot, without any adequate basis, guess or speculate in such an action as to the pecuniary loss suffered by the plaintiff before the trial, we can perceive no reason for not applying the same rule to future pecuniary loss. Before damages for future pecuniary loss can be awarded, there should be some proof such as a party can always give of his circumstances and condition in life, his earning power, skill and capacity. So much is left to the arbitrary judgment of jurors in this class of cases that the rule which requires such proof of pecuniary loss should not be relaxed.

The judgment should, therefore, be reversed and a new trial granted, costs to abide event.

All concur, except RUGER, Ch. J., and DANFORTH, J., dissenting.

**MICHAEL L. HUNT, Appellant, v. THE CITY of OSWEGO,
Respondent.**

Court of Appeals, October 18, 1887.

Costs. Actions against municipal corporations.—Section 3245 of the Code does not apply to actions *ex delicto*, and the notice, referred to in said section, is not required as the condition of a right to recover costs by the plaintiff in such actions.

Appeal from an order of the general term of the supreme court, reversing a special term order denying costs to the plaintiff.

W. H. Kenyon, for appellant.

Elisha B. Powell, for respondent.

RUGER, Ch. J.—In *Gage v. Village of Hornellsville*, decided in this court July 1, 1887 (8 N. Y. State Rep. 885), it was held that there was no substantial distinction between section 2, chapter 262 of the Laws of 1859, and section 3245 of the Code of Civil Procedure. It has been frequently held in this court in cases arising under the statute of 1859, that it did not apply to actions *ex delicto* and that the notice, therein referred to, was not required as the condition of a right to recover costs by the plaintiff in such actions.

The precise question involved in this case came before us in *Gage v. Village of Hornellsville*, and we there held that section 3245 of the Code of Civil Procedure applied only to actions arising *ex contractu*. While this result was strongly intimated in *Taylor v. Cohoes* (105 N. Y. 54; 6 N. Y. St. Rep. 461), it was not expressly so decided, and thus left room for misapprehension upon the question here involved.

Gage v. Village of Hornellsville was decided July 1st, the same day that this case was determined by the general term,

MEMORANDA.

and they could not have been informed of our decision, otherwise we are bound to presume their judgment would have been the reverse of that rendered by them.

The order of the general term should be reversed and that of the special term affirmed.

All concur.

JULIUS FORSTMANN *et al.*, Respondent, v. RUTH A. SCHULTING, Administratrix, *et al.*, Appellants.

Court of Appeals, October 25, 1897.

See 4 N. Y. St. Rep. 463.

Appeal. Time.—A notice of an order and its entry is ineffectual to limit the time of appeal, unless it shows by indorsement or otherwise the office address or place of business of the attorney serving it.

Motion to dismiss the appeal herein on the ground that the time for appealing had expired when the notice was served.

Matthew Hale, for motion.

N. C. Moak, opposed.

MEMORANDA.—The notice of the order and its entry did not show by indorsement or otherwise the office address or place of business of the attorney serving it, and was therefore ineffectual to limit the time of appeal. *Kelly v. Sheehan*, 76 N. Y. 325; *Bockes v. Hathorn*, 78 id. 222.

The motion to dismiss the appeal should therefore be denied, but without costs.

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FLEMING STANHOPE PHILIPS, Respondent, v. THE GERMANIA BANK, Appellant.

Court of Appeals, October 18, 1887.

Dismissing appeal in same case, 20 Abb. N. C. 38; 10 N. Y. St. Rep. 40.

Constitutional Law. When judge disqualified.—A general term may review on appeal an order vacating an *ex parte* order for the examination of a person before trial upon the original and additional affidavits, even though the justice who granted the *ex parte* order is a member of such general term and acted on such review.

Appeal from an order of the general term of the supreme court, reversing an order vacating an order for the examination of the treasurer of the defendant.

Joseph A. Shoudy, for appellant.

Larned & Curtis, for respondent.

EARL, J.—The defendant was a Massachusetts corporation and the plaintiff was in its employment under a contract whereby he was to receive a share of its profits as compensation for his services, and he commenced this action to recover his share of the profits. On the 18th day of March, 1887, Judge VAN BRUNT made an order under section 872 of the Code of Civil Procedure, requiring Hermann Strusberg, who was one of the directors and the treasurer of the defendant to appear before him or some other judge of the supreme court, at chambers, on the 28th day of March, 1887, for the purpose of being examined, "pursuant to the provisions of the Code of Civil Procedure in such cases made and provided." Thereafter on the day named, a motion was made on behalf of the defendant before Judge PATTERSON, at chambers, to vacate Judge VAN BRUNT'S order. That motion was based upon the papers upon which the order was granted

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and the affidavit of Strusberg and other papers, and after hearing counsel for both parties an order was granted vacating the order for the examination of Strusberg, provided the defendant stipulated to allow an examination of its books, which stipulation was given. From that order plaintiff appealed to the general term, and there the order of Judge PATTERSON was reversed and the order of Judge VAN BRUNT was reinstated, with costs and disbursements, and the examination of Strusberg under the first order was set down for the 15th day of August, 1887. The general term was composed of Judges VAN BRUNT, DANIELS and BARTLETT, and Judge VAN BRUNT wrote the opinion. From the order of the general term the defendant appealed to this court, and the point is now made, so far as the record appears for the first time, that the general term was not properly constituted for the reason that Judge VAN BRUNT was a member thereof and thus that section 8 of article 6 of the constitution was violated, which provides that "No judge or justice shall sit at a general term of any court or in the court of appeals in review of a decision made by him or of any court of which he was at the time a sitting member."

The answer to the objection is that Judge VAN BRUNT's order was not under review at the general term, but the order of Judge PATTERSON was the subject of consideration. That order was not based upon the same papers that were presented to Judge VAN BRUNT, but upon additional papers. Judge PATTERSON was not acting upon an appeal from Judge VAN BRUNT's order, and was not strictly sitting in review of his order, but upon new papers he heard a motion to set it aside. That motion was a new and distinct proceeding, not a continuation of the proceeding commenced before Judge VAN BRUNT. The general term had no occasion to determine whether the order granted *ex parte* by Judge VAN BRUNT was well granted or not. On the papers presented to him there could be no reasonable dispute that it was well granted. The question which the general term

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had to examine was, whether upon all the papers appearing before Judge PATTERSON he properly vacated the previous order; and we are, therefore, of opinion, that it cannot be said that the general term was in any proper sense sitting in review of the decision made by Judge VAN BRUNT.

Whether upon all the papers before the general term there were sufficient facts to justify the examination of Strusberg under the section referred to rested in its discretion. The papers showing a formal compliance with the section, the exercise of its discretion is not reviewable here.

The appeal should therefore be dismissed.

All concur.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Respondent, v. CHARLES VON GLAHN, Appellant.

Court of Appeals, October 25, 1887.

Affirming same case, 36 Hun, 643, Mem.

Mortgages. Taxes.—Where a mortgage requires the mortgagor to pay all taxes and assessments, and upon his default empowered the mortgagee to pay the same “with any expense attending,” and made the amount so paid a lien upon the premises; and where, in an action to foreclose the mortgage, the mortgagee employed a searcher to examine and determine what were legal taxes and assessments, and see that proper deductions were made for the illegal charges, agreeing to give him a certain proportion of the amount he succeeded in having deducted, and paid the legal liens and the percentage so agreed upon, the latter is a proper item of expense, and became on payment a lien upon the premises; and a tender not including the amount of this item was insufficient.

Appeal from a judgment of the general term of the supreme court, reversing the judgment of the special term in favor of defendant, and directing a new trial.

Opinion of the Court, by EARL, J.

F. H. Smith, for appellant.

G. Waddington, for respondent.

EARL, J.—On the 1st day of November, 1869, the defendant Doscher, owning certain real estate in the city of Brooklyn, executed to the plaintiff a mortgage thereon to secure the sum of \$4,000. The mortgage contained a provision that the mortgagor should pay “all taxes, charges and assessments which may be imposed by law upon the said mortgaged premises or any part thereof, and in default thereof that it shall be lawful” for the mortgagee “to pay the amount of any such tax, charge or assessment, with any expenses attending the same, and any amount so paid” the mortgagors covenanted to repay, with interest, and that the same should be a lien upon the premises. On the 5th day of May, 1870, Doscher executed another mortgage on the same real estate to the defendant Von Glahn. In December, 1882, Von Glahn commenced an action in the supreme court to foreclose his mortgage, and his action resulted in a foreclosure of the mortgage and a sale of the premises, at which he became the purchaser on the 15th day of March, 1883. On the following day he received a deed and took possession, and has ever since been the owner and in possession of the premises. On the 15th day of March, 1883, Von Glahn informed the plaintiff of his purchase and possession of the premises, and it then insisted upon the payment of its mortgage. On the 9th day of April, 1883, Von Glahn formally tendered to it, absolutely and unconditionally, \$5,830, in United States legal tender currency, in payment of its mortgage, which it refused to receive solely upon the ground that the sum was insufficient in amount. The total amount due on its mortgage at the time of the tender was \$5,797 and 98-100, unless it was entitled to include therein \$58 and 48-100 paid to one Moss crop, which will be more particularly referred

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to hereafter. In May thereafter it commenced this action to foreclose its mortgage.

In his answer Von Glahn alleged as a defense to the action the tender of the amount due upon the mortgage, claiming that such tender operated to release the mortgaged premises from the lien of the mortgage. At the special term this defense was held sufficient, and a judgment was rendered dismissing the complaint. From that judgment the plaintiff appealed to the general term, where the judgment was reversed and a new trial granted, and then the defendant Von Glahn appealed to this court.

It is unnecessary for us to determine precisely what effect the tender of Von Glahn, which was not kept good, had under the circumstances of this case, because there is another ground upon which the decision of the general term can be sustained.

Upon the trial it appeared that there were taxes and water rates for five consecutive years, commencing in the year 1877, and some assessments for grading and paving for a sewer amounting in all to more than \$1,000, all charges upon the land, which were due and unpaid, and which the mortgagor had neglected to pay. The plaintiff paid such taxes and assessments, and in reference to such payment the trial court found as follows: "*Twelfth*. That on the said 27th day of June, 1882, the plaintiffs, in order to prevent the accumulation of interest upon said unpaid taxes, water rates and assessments, and in pursuance of the powers and privileges which their said mortgage by the said tax clause therein contained conferred upon them and invested them with, resolved to pay these unpaid liens, but in order to effect such payments at the smallest possible cost, and so that said mortgaged premises should receive the greatest possible benefit therefrom, they still acting by virtue, and in pursuance of said powers and privileges with which they were endued as aforesaid, and so far as one of said assessments was concerned, at the instance, also, of said John H.

Doscher, who continued to be the owner of said mortgaged premises, and was the only person interested therein (except the defendant, Anna L. C. Doscher, his wife), of or as to whom said plaintiffs had any knowledge or information, further resolved that before they paid any one of said unpaid liens, they would submit the matters of the payment of them all to one Thomas D. Mossdrop, a tax searcher in the said city of Brooklyn, so that said Mossdrop might endeavor to reduce, or cancel any item or principal, or interest, or advertising that might be illegally charged in the case of any or either of said unpaid liens, and agreed with the said Mossdrop to pay him twenty-five per cent of the amount he might succeed in having deducted from the entire amount which might be claimed upon said unpaid liens."

In pursuance of his employment Mossdrop examined and investigated each of the taxes, water rates and assessments, saw that proper deductions were made therefrom under the act, chapter 348 of the Laws of 1882, and procured accurate bills of the amounts which should be paid upon the same and took them to the plaintiff which then paid them, and also paid him for his services \$58.48, which is the item above referred to which was in dispute between the parties. The plaintiff claims that the sum thus paid to Mossdrop, was an expense within the meaning of the mortgage attending the payment of the taxes, water rates and assessments.

It is not entirely clear what expense was alluded to in the phrase in the mortgage, "with any expense attending the same." If its meaning is doubtful, the doubt may be solved in favor of the mortgagee, as the language is that of the mortgagor. On the part of the defendant, it is claimed that the word expense had reference to penalties, the expenses of redemption from any sale, and other similar expenses attending the taxes, and not an expense attending the ascertainment and payment of them. We think this is

too narrow a construction. The word "expense" is quite inapt, and would not naturally be used to cover penalties, and as both mortgagor and mortgagee were at liberty to pay the taxes, and both interested to pay them, it cannot be presumed that the parties contemplated a sale of the premises for non-payment of the taxes and expenses thus made. The mortgage made it the express duty of the mortgagor to make prompt payment of these charges, and authorized payment by the mortgagee only in case of his default. Any expense which by his default he imposed upon the mortgagee was probably within the contemplation of the parties, and it could not have been within their contemplation that the mortgagor could voluntarily omit to pay the taxes, and thus shift from himself to the mortgagee, ignorant of the facts relating to the taxes, the burden of bearing the necessary expense attending their payment. It is just that the mortgagor should bear such expense. Here were numerous taxes, water rates and assessments, under the complicated system of taxation and assessments existing in the city of Brooklyn, charges upon these lands. While the mortgagee had the right to pay for its protection, these charges and add them to its mortgage, yet it could pay only such as were legal and collectible and as the mortgagor was under obligations to pay. Hence, it became important that they should be carefully scrutinized to ascertain how much was due for them, and to protect the mortgagee from any illegal exaction. For that purpose, it was entirely proper for it to employ an expert, acting in good faith, and the reasonable expense of such an expert became a fair charge under this mortgage against the mortgagor, and within its terms a lien upon the mortgaged premises. This construction is neither inconvenient nor under such a mortgage dangerous. The mortgagee must act in good faith, with reasonable judgment, and the expense must be reasonable in amount. When all these concur, there is no reason or equity in imposing the ex-

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pense upon the mortgagee and relieving the defaulting mortgagor and his land therefrom.

We are, therefore, of opinion that the tender was insufficient in amount and ineffectual, and for this reason the order of the general term must be affirmed, and judgment absolute rendered against the appellant upon his stipulation.

All concur (DANFORTH, J., in result), except RUGER, Ch. J., not voting.

THOMAS M. KING *et al.*, Respondents, v. LEON BARNES
et al., Appellants.

Court of Appeals, October 25, 1887.

See 4 N. Y. St. Rep. 893.

1. *Appeal. Interlocutory judgment.*—A judgment, which finally determines certain matters in controversy between the parties but appoints a referee and directs an accounting before him, is an interlocutory judgment, from which no appeal lies to the court of appeals.
2. *Same. Discretionary order.*—The general term has power, in its discretion, to grant, on appeal from an order refusing it, an amendment to a complaint, which does not substantially change the plaintiff's claim, and its order allowing the amendment is not appealable to the court of appeals.
3. *Same. Order granting stay.*—An order reversing an order granting a stay of proceedings pending an appeal to the court of appeals, is in the discretion of the general term, and is not reviewable by the former court.

Appeals and special motions to dismiss the same were argued and disposed of together.

The facts, so far as are necessary to prevent the appeals, sufficiently appear in the opinion.

John H. Post, for appellants.

Opinion of the Court, by EARL, J.

Noah Davis, of counsel ; *W. W. McFarland* for respondents.

EARL, J.—*First.* The judgment of the special term entered on the 2d day of August, 1886, was an interlocutory judgment. It finally determined certain matters in controversy between the parties, but it ordered an accounting between them and appointed a referee for that purpose ; and final judgment could not be entered until the accounting was had and report made. From that judgment the defendant Barnes appealed to the general term, and he also served notice of a motion at the general term under section 1001 of the Code for a new trial upon the exceptions. The motion and the appeal came on to be heard at the general term at the same time, and the motion was denied and the judgment was modified. But the modification of the judgment in no way affected its character as an interlocutory judgment. The accounting between the parties was still to be had, and its scope was enlarged and all questions as to costs and expenses of the reference, as to the distribution by the referee of money which should come into his hands under the judgment, and as to the satisfaction of a certain mortgage for \$250,000, were reserved, and thus there was to be further judicial action. From the last named judgment Barnes and certain of the other defendants appealed to this court from the order of the general term which denied his motion for a new trial. The plaintiffs now move to dismiss the appeal to this court from the interlocutory judgment as not authorized. The contention of the appellants is that it is final and not interlocutory. As we have come to the conclusion that it is interlocutory, the appeal therefrom to this court is not authorized by the Code, and it must be dismissed, with costs.

Second. At the trial the plaintiffs made a motion to amend their complaint by inserting therein certain additional allegations. The motion was denied and a formal order denying it was entered. From that order the plaintiffs appealed to the general term and it reversed the order and allowed the

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amendment. The amendment did not substantially change the claim of the plaintiffs, and it was therefore within the discretion of the court to grant it under section 723 of the Code. From the order of the general term certain of the defendants appealed to this court. A motion is now made to dismiss the appeal. As the general term had power, in its discretion, to grant the amendment, its order is not appealable to this court and the appeal must be dismissed, with costs.

Third. The judgment of the general term ordered that certain shares of the capital stock of the New York Transit and Terminal company should be delivered by one of the defendants in whose possession it was as a mere depository to the referee appointed by the judgment, to be disposed of by him as directed in the judgment.

Upon the appeal of the defendants from the judgment of the general term to this court they gave the security requisite to perfect the appeal under section 1326 of the Code. They then made a motion that the depository or custodian of the stock should, in pursuance of the judgment, be required to deliver the stock to the referee, and that motion was granted and the stock was so delivered. Certain of the defendants then made a motion that the plaintiff's proceedings upon the judgment be stayed until the hearing and decision of their appeal to this court, which was granted.

From that order the plaintiffs appealed to the general term, and there the order was reversed. From the order of reversal the defendants appealed to this court. They claim that the proceedings were stayed under section 1328 of the Code, which provides as follows: "If the appeal is taken from a judgment or order directing the assignment or delivery of a document, or of personal property, it does not stay the execution of the judgment or order until the thing directed to be assigned or delivered is brought into the court below, or placed in the custody of an officer or receiver designated by

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the court, or the appellant gives a written undertaking, as prescribed in the next section."

It is not needful now for us to determine whether the proceedings are, as claimed by the appellants, stayed under this section; for if they are the appellants are yet not entitled as matter of right from the court to an order staying the proceedings. Whether the court below would grant such an order rested in its discretion, and that discretion is not reviewable here. If the appellants claim that they have an absolute statutory stay they may move to set aside or vacate any proceedings taken in violation of the stay or treat such proceedings as void, and thus their right to a stay and the construction and effect of the section quoted can be brought before the courts for construction and determination. The appeal should, therefore, be dismissed with costs.

Fourth. The defendants moved here to amend the return upon the appeal from the order of the general term which allowed the amendment of the complaint by inserting the complaint in the return. As we have concluded to dismiss that appeal the motion is unnecessary and must be denied.

Fifth. After the entry of the general term interlocutory judgment, the accounting therein ordered was had before the referee and his report was made and final judgment thereon entered, and the defendants also appealed to this court from that final judgment, and in their notice of appeal, they gave notice that they would also bring the interlocutory judgment up for review. They now move to have the appeal from the interlocutory judgment and the final judgment consolidated and heard together. As we have concluded to dismiss the appeal from the interlocutory judgment this motion must be denied.

Sixth. The defendants made a motion for a further stay of plaintiff's proceedings until a hearing and decision of the appeals and motions which we have above disposed of. The

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disposition made of those appeals and motions requires us to deny the motion for a stay.

Unless something in the numerous papers submitted to us has escaped our attention, we have now considered and disposed of all the motions pending in this case before us, and orders may be entered carrying into effect our conclusions. The result of these motions cannot much embarrass or prejudice any legitimate interests of the defendants, as the appeals from the final judgment and from the denial of the new trial will bring to this court for review every question which is reviewable here.

HENRY C. DART, Respondent, v. WILLIAM E. LAIMBEER,
Appellant.

Court of Appeals, November 29, 1887.

1. *Contract. Breach. Proof of damages.*—Where parties have entered into an agreement to continue as partners for one year, and the firm is broken up and dissolved after four months by the act and fault of defendant, the courts ought not to be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits.
2. *Evidence. Secondary.*—There is no fatal error in the admission of a copy of a letter, though no sufficient ground was laid for the admission of secondary evidence of its contents, where it is perfectly plain that no harm could have resulted from its admission.

Action to recover damages alleged to have been sustained by reason of the breach of a copartnership agreement.

Appeal from a judgment of the general term of the superior court of New York city affirming a judgment entered upon a verdict.

Edward S. Rapallo, for appellant.

George W. Wingate, for respondent.

Opinion of the Court, by PECKHAM, J.

PECKHAM, J.—The defendant objects to the recovery in this action on two grounds: *First*. That there was not evidence sufficient to go to the jury to show that there would have been any profits from the business of the firm, from March to the end of the year in case the partnership had not been dissolved. *Second*. That there was error in the reception of the Perot letter.

In regard to the first we think there was evidence sufficient to go to the jury upon the question of future profits.

The plaintiff, while on the stand, swore that the business of the firm went on from November up to the time of the dissolution in March very prosperously increasing; that there were no signs of diminution; that the trade was in town and out of town and that they had their salesmen out; that the firm sold two classes of flour, called the barrel flour and the package flour, the former in the summer and the latter in the winter; that for barrel flour the summer was the best season, and the package flour sold best in the winter. He proved by another witness, who was salesman and who went into the employ of the firm in February, 1880, that he sold the flour in Jersey City, where he had a good trade; that he started with 160 stores, sold considerable and had a great deal more sold when in March the defendant told him to stop, and said that he would not send out any more goods and that no more orders would be filled. The witness also stated that he had a considerable trade in barrel flour, and as the city trade fell off the country trade increased—just doubled, and that his trade was increasing with a prospect that it would continue to increase during the year, and at that time the defendant stopped the business. The plaintiff, also, proved by another witness who was in the employ of the firm that the best part of the year for the business commences about September, and lasts until about January, and then there is a slack for a while and then picks up again about the first of February and continues to be better until the summer. He further test-

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ified that there was no reason that he knew of why this business, if it had gone on, would not have been a good business from April to November, or why it would not have been a success from the time it stopped in March until the following November, and so far as he saw, the plaintiff conducted the business properly.

The plaintiff also produced and read in evidence what he claimed was a copy of a letter written by the defendant to a man named E. L. Perot, dated the 19th of April, 1880, in which letter he stated that the books of the firm showed a profit of four hundred and odd dollars per month; that he was settling up the accounts and hoped it would prove what the books showed.

The plaintiff also proved that on the first of January, after the concern had been in operation two months, a statement of the affairs of the firm was made by the book-keeper, and such statement was present at the time that the partners had a conversation in regard to the state of the business. This statement was then looked at, and it was proved, and not contradicted, that it showed a profit for the two months of some \$1,600, and that the defendant stated "that is doing very well, indeed; that is satisfactory." Some conversation was had between the partners at that time in regard to what disposition should be made of the profits. It was understood that this \$1,600 of profit was based upon the condition of the firm as shown by the books, in which the accounts due the firm, and amounting to six or eight thousand dollars, were regarded as assets to the full amount, and if those accounts were not all collected the amount of the profits would be reduced accordingly.

This substantially was the character of the evidence given by the plaintiff for the purpose of furnishing a basis for the jury to come to a conclusion as to the amount of damages which he sustained by reason of a dissolution of the partnership before the time agreed upon.

A motion for a nonsuit, on the ground, among others,

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that no sufficient evidence had been given upon which to base a claim to recover for prospective or future profits, was denied by the court.

The defendant, in order to meet this evidence, proved by an expert, who had made an examination of the books (there being no substantial dispute but what the books had been properly and accurately kept), that when the statement was made of the condition of the concern on the first of January, 1880, after it had been in existence for two months, and which statement showed an apparent profit of \$1,600, that it appeared (as already stated) that such profit was based upon the assumption that the accounts which appeared as outstanding were all good and collectible. Another statement was made, as from the books, up to the 2d of March, 1880, in which it appeared that the profits for the two months from January to March, based upon the same assumption of the collectibility of the accounts, amounted to only \$97. The expert further testified from an examination of the books that the entries therein as they stood on the day he examined them, and long after the dissolution of the company, disclosed a deficiency of \$2,665, as a result of the business of the firm during the time of its existence. This was based upon all the entries in the books containing a statement of all the business of every name and nature, and all the receipts and disbursements. It would thus appear that after the dissolution of the firm, when the property of the firm was sold and the accounts were in course of collection, the result at the time when the balance was struck was as defendant stated above, viz. : a loss instead of a profit upon the business done.

The explanation as to how there could have been a profit of \$1,600, on the first of January, and of ninety-seven dollars on the first of March, for the two months immediately preceding, and yet when the firm was dissolved and proceedings taken to wind it up, that a loss should be the result is made to appear by the evidence on the part of the

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plaintiff. The proof on the part of the defendant simply showed that the accounts had not all been collected at the time when the expert witness examined the books. But there was no evidence that the accounts themselves were not against solvent debtors, who would have paid if the business had continued. The plaintiff showed that by suddenly dissolving the firm and breaking up the business in March, after its existence of but four months, losses occurred to the firm on that account. It would seem that the business of the firm was made of small accounts against a large number of customers, and that a sudden dissolution and going out of business had the effect upon their various customers of making them negligent in paying the firm debts, and the amounts in each case were too small to make it worth while to attempt to collect them by legal proceedings. Hence one source of loss on winding up the concern.

It would seem, also, that there had been a loss upon the sale of the personal property of the firm, including the machinery, and quite large expenses had been incurred, in fitting up the store which had gone into the machinery account, and in closing the firm business at the end of four months, the profits realized had not been sufficient to counterbalance the loss upon the sale of the property of the firm and to make up the amount expended by way of repairs, etc., to the store. So that as a final result the firm sustained a loss instead of securing a profit from its four months' business. This does not necessarily affect the correctness of the assumption of profit made in the statements of January and March, 1880. The loss on the sale of the firm's property and the amount expended for repairs should have been offset against a year's profits, instead of four months, and therefore, but one-third of those amounts ought in any event to be charged against these assumed profits. Then again there is not any evidence that the accounts could not have been readily collected in case the business had gone on. And lastly, upon the evidence on

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the part of the plaintiff there was the fair prospect of the increase of business and a consequent increase of profits during the next eight months. All this evidence, we think, was quite sufficient to explain why upon the assumption of the accounts being good there should have been a profit in January and again in March appearing by the books, and yet upon an undue and premature winding up of the business of the firm there should subsequently appear to have been a loss instead of a profit upon the whole business.

This evidence in relation to the firm having realized any profits from their business during the four months, is only material as bearing upon the possibilities or probabilities of the same fortune attending it during the eight succeeding months.

It is not, as a measure of damages, that the evidence is given, but only as a fact from which inferences might be drawn by the jury as to what was reasonable and probable about the amount of profits to be realized from the business during the eight succeeding months had the firm continued business. If, as matter of fact, there had been a loss during those four months, if there were evidence satisfactorily explaining such a loss and also showing an inherent probability or almost certainty of a charge in the future, and that the succeeding months would have resulted in a business profit, the plaintiff would still have been entitled to a verdict.

Upon the whole we think there was evidence sufficient to go to the jury upon the question of probability of profits during the eight months unexpired at the time of the dissolution of the firm, and that the verdict of the jury should not be disturbed on that ground. The verdict shows that the parties entered into an agreement to continue as partners for one year, and that the firm was broken up and dissolved after four months by the act and fault of the defendant. Under such circumstances courts ought not to

be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits.

As was said in *Bagley v. Smith* (10 N. Y. 499), "it is the misconduct of the defendant which has rendered the inquiry necessary," and, it may be added, has also made it quite difficult. Within the rule as to prospective profits laid down in *Wakeman v. Wheeler, etc., Co.* (101 N. Y. 205) we think the plaintiff, by his proof brought, this case. Upon the second ground, viz., the admission of the Perot letter, we think there is no cause for a reversal of this judgment.

Whether there was error or not in the admission of a copy of the letter, as claimed by the defendant's counsel, for the reason that a sufficient ground was not laid for the admission of secondary evidence of its contents, we think it perfectly plain that no harm could have resulted from its admission. We do not decide that it was error to admit it, but assuming error we say no harm could have been caused by it. The letter simply stated that the books showed a profit of four hundred and odd dollars per month.

The books were subsequently put in evidence by the defendant, and evidence was given on his part proving that the books did show a profit of that average amount per month upon the assumption already stated of the collectibility of the accounts, and of course without considering the possible loss arising from a sale of the firm's property on a premature winding up of the concern. It is evident that the defendant in writing the letter understood exactly that the profit was based wholly upon this assumption of collectibility, which fact explains the expression used in the letter, "I am settling up the accounts and hope it will prove what the books show." Any one reading it would see that the profits appearing from the books were based upon the assumption that the accounts should prove collectible.

Opinion, PER CURIAM.

There is nothing else material in the letter. The expression used therein that "one thing is sure, the capital is always intact," is obviously but the expression of an opinion, and is followed up by the further statement that "a personal investigation of the whole matter would, I think, be more satisfactory to you."

Neither of the grounds argued by the defendant's counsel is sufficient upon which to reverse the judgment, and it should, therefore, be affirmed, with costs.

All concur except RAPALLO, J., absent.

**MERCHANTS' LOAN, AND TRUST COMPANY, Appellant, v.
HENRY CLAIR, Respondent.**

Court of Appeals, November 29, 1887.

Affirming same case, 36 Hun, 362.

Corporation. Receiver. Real party.—Where a corporation, in an action upon a promissory note, after proving the note and its incorporation, put in evidence an order of the court of chancery of New Jersey, in which state the plaintiff was incorporated, appointing a receiver, and a statute of New Jersey, providing for the appointment of a receiver, when any corporation shall be dissolved, the inference is that the plaintiff had no longer a corporate existence, and the complaint is properly dismissed.

Action by a corporation organized under the laws of New Jersey, upon a promissory note made by defendant.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered upon the dismissal of the complaint at the circuit.

J. A. Mapes, for appellant.

D. McCurdy, for respondent.

PER CURIAM.—The plaintiff, on the trial of this action,

Opinion, PER CURIAM.

after making a *prima facie* case for a recovery, instead of resting seems to have unmade it. The suit was on a promissory note which was fully proved together with the due incorporation of the plaintiff. Without pausing at this point and leaving the burden of the defense upon the defendant the plaintiff proceeded to throw doubt upon his own case. He put in evidence an order of the court of chancery of New Jersey, in which state the plaintiff had been incorporated, appointing a receiver of the corporate property founded upon a petition alleging the insolvency of the company and that it had suspended business for want of funds. This order directed the receiver to collect and turn into money the assets of the corporation and pay the proceeds, not to it, but to the creditors of the company. This might have been an interlocutory order under the law of New Jersey, but for the apparent purpose of showing the foreign law which authorized the order, the plaintiff read in evidence a statute of New Jersey providing for the appointment of a receiver "when any corporation shall be dissolved." The only admissible inference from this proof was that the receiver had been appointed under the New Jersey law after or upon the dissolution of the corporation, and that the plaintiff had no longer a corporate existence. At this point the plaintiff rested and the defendant moved to dismiss the complaint. The plaintiff, with its attention drawn to the difficulty instead of proving some other law under which the receiver had been appointed, and consistent with the life of the corporation, stood upon the case as made, and his complaint was dismissed. That seems to us to have been a correct decision.

The whole argument for the plaintiff proceeds upon the assumption that the corporation had not been dissolved. That may have been the truth, but upon the evidence which the plaintiff himself gave the inference is the other way.

The judgment should be affirmed with costs.

All concur, except RAPALLO, J., absent.

Opinion of the Court, by EARL, J.

JOSEPH H. BERRY *et al.*, Respondents, v. ANDREW BROWN,
Appellant.

Court of Appeals, November 29, 1887.

Reversing same case, 37 Hun, 639, Mem.

1. *Contract. Consideration.*—An agreement by a husband to pay the firm debts on a purchase by his wife of her partner's interest, is made for the benefit of the vendor to relieve him from, and to indemnify him against the firm debts without any intention to secure any benefit to the firm creditors ; and as the sale is not made to the husband, and no consideration whatever passed to him, the creditors, who are strangers to the agreement, cannot enforce it against him,
2. *Same. Statute of frauds.*—A promise by the husband to pay all the firm debts upon his wife's purchasing her partner's interest therein, unless in writing, is invalid under the statute of frauds, for the reason that he acquires no interest in, nor receives any benefit from, the property conveyed.

Appeal from a judgment of the general term of the supreme court affirming a judgment entered upon a verdict, and also from an order affirming a special term order, denying motion for a new trial upon a case and exceptions.

Joseph H. Choate and *James F. Gluck*, for appellant.

Spencer Clinton, for respondents.

EARL, J.—This action was brought by the plaintiff, who held claims against the firm of Zeiss & Company, which firm was composed of Zeiss and Maria A. Brown, the wife of the defendant, to recover upon such claims against the defendant on the ground that he had assumed the payment of them. It was alleged in the complaint that on or about the 8th day of January, 1881, Zeiss sold all his interest in the firm property to the defendant, and that as part of the considera-

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tion of the sale, the defendant agreed to pay all the firm debts, including the claims of the plaintiff. The defendant put in issue all the material allegations of the complaint.

Upon the trial it appeared that Zeiss and Mrs. Brown entered into copartnership for the purpose of manufacturing and selling varnish at Windsor, in Canada, for the term of three years, commencing July 1, 1878, and ending July 1, 1881; that Mrs. Brown contributed her own capital to the firm; that the defendant had no interest therein; but that he held a power of attorney under seal to act for his wife. The firm business was conducted until January, 1881, when the defendant opened negotiations with Zeiss for the sale by him of his interest in the firm and his retirement therefrom. The negotiations terminated in the execution of a written agreement, dated January 11, 1881, by which Zeiss sold out all his interest in the firm business and assets to Mrs. Brown, she agreeing as the consideration of the sale to pay him the sum of \$300, to allow him to retain \$700, which he had wrongfully taken of the funds of the firm, and to assume and pay all the debts of the firm. The agreement was under seal between Mrs. Brown of the first part and Zeiss of the second part, and it was first signed by "Maria A. Brown, per Andrew Brown, attorney in fact," and then by "W. Zeiss," and it was acknowledged by the defendant as attorney for his wife and by Zeiss before a notary public. It is not alleged that there was any fraud in the draft or execution of this agreement. It was read over to Zeiss and he testified that he understood it. He made objections to some of the language used in it and looked it over himself. The defendant and the attorney who drew the agreement testified that it expressed truly the whole agreement between the parties. Yet Zeiss was permitted to testify that he did not understand it as written, and that he understood he was making the sale to Kruger & Co., although that name did not appear in the writing and was not mentioned at the time the writing was signed. But he

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did not testify that he made the sale to the defendant or that he understood that he made it to him. He testified, however, that Kruger & Co., to whom he supposed he was making the sale, were to assume and pay the firm debts. It is clear from his evidence that he understood and that it was agreed that the purchaser, whoever, he was, was to assume and pay the firm debts. But he also testified that the defendant said during the negotiations and before the execution of the written agreement, that he, Zeiss, "should be relieved from all indebtedness of the firm;" that he, the defendant, "would see that the creditors are paid;" that it was the agreement that he "was to pay the debts."

It is left uncertain which of these phrases, if any of them, was used by the defendant. It is not a fair inference from the situation or from anything said or done during the negotiations that the defendant who had no personal interest in the firm, who was not under any liability for the firm debts, and was not the purchaser of the interest of Zeiss in the firm assets, meant, or was understood by Zeiss, to bind himself personally for the payment of all the firm debts. He was present at the negotiation as the attorney of his wife, and was acting for her, and the fair construction of all the language imputed to him is that he was speaking and acting for her when he gave the assurance that all the debts should be paid, and that assurance was carried out and embodied in the written agreement. By this construction the language imputed to the defendant is brought into harmony with the written agreement, and with the undisputed facts surrounding and attending upon its execution. The burden was upon the plaintiffs to show that the defendant agreed for himself to be personally bound to pay the firm debts, and a careful scrutiny of the record satisfies us that there is scarcely a scintilla of evidence to prove such an agreement, and the jury should not have been permitted to find it.

But suppose the plaintiffs are right in their contention

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that the defendant used the language imputed to him by Zeiss, and above quoted, meaning thereby to bind himself personally, then we think it cannot be said that his agreement was made for the benefit of the plaintiffs. It was an agreement for the benefit of Zeiss to relieve him from and indemnify him against the debts of the firm without an intention to secure any benefit to the firm creditors; and as the sale was not made to the defendant, and no consideration whatever passed to him, these plaintiffs, strangers to the agreement, cannot enforce it against him. *Merrill v. Green*, 55 N. Y. 270; *Simson v. Brown*, 68 id. 353.

But the plaintiffs have to encounter a still further difficulty. The agreement imputed to the defendant is invalid under the statute of frauds because not in writing. As before stated, the sale was not to the defendant. He took no interest in the property conveyed, and received no benefit from it as all the firm property was subsequently sold and its proceeds applied upon firm debts. He was not antecedently liable for the payment of the firm debts and had no personal interest in their payment. The liability of Zeiss for the debts was not extinguished, but remained in full force unaffected as between him and the firm creditors. The defendant's promise, therefore, assuming that it was made, was to answer for the debts of Zeiss, or for the default of Kruger & Co., or for the default of Mrs. Brown, and in either event it was invalid under the statute of frauds. It matters not that there was a consideration of harm to Zeiss from his transfer of the property; there was no consideration of benefit to the defendant. For the conclusion we thus reach, the cases of *Mallory v. Gillett* (21 N. Y. 412), and *Belknap v. Bender* (75 N. Y. 446), are ample authorities.

The plaintiffs should, therefore, have been nonsuited, and hence the judgment should be reversed and a new trial granted, costs to abide event.

All concur, except RAPALLO, J., absent.

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SALLY M. JEFFERS, Appellant, v. ROBERT N. JEFFERS,
Respondent.

Court of Appeals, November 29, 1887.

Affirming same case, 37 Hun, 638, Mem.

1. *Watercourse*.—A watercourse, as defined in the law, means a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water.
2. *Same. Drainage*.—An action to restrain the defendant from digging a ditch and turning upon land water which never was there before, but naturally flowed elsewhere, will be dismissed, where, though there was an increase in the flow, it had done the plaintiff no substantial or material damage.

Action to restrain defendant from discharging surface waters collected on his lands through an artificial ditch or drain, and to recover damages.

The court found, in substance, the following facts:

The parties are adjoining proprietors, the plaintiffs' farm lying north and defendant's south of the centre of a certain highway.

There is a sluice across this highway on the lands of the parties, through which there is an old natural channel and watercourse for the flow of waters from the defendant's land at the south on to the plaintiffs' lands, and thence by a ditch and natural way across the lands of plaintiffs and over one or two other owners northerly and easterly into a ditch called the "Sodus Ditch" which drains this section of the county into Sodus Bay on Lake Ontario.

At the south end of this sluice and on the defendant's land there is a small pond, hole or depression of land in which the waters accumulate before running over and through said sluice. From this pond or depression there is

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a watercourse or channel ascending gradually through a hollow or ravine on the defendant's land, southerly a distance of four hundred and eighty feet to another sluice in a stone fence, running east and west, through which sluice and into the channel below there has always been a flow and escape of the surface waters falling or collecting on the defendant's land south of said stone wall for a distance of about twenty rods, at which distance south of said stone wall, and running east and west, nearly parallel with stone wall, is a ridge or elevation of ground, forming a divide or water-shed, south of which the surface waters flow southerly and into Clyde river, and north of which ridge or elevation the surface waters find their way by a slight descent into and through the sluice under said stone wall, and thence into the ravine or waterway aforesaid, and northerly through the same, and thence into the pond through the said sluice in the highway, and on to and in and through an old watercourse over the plaintiffs' lands.

The court further found that between the stone wall and the ridge was a depression in the soil, usually dry in dry weather, but which in times of heavy rains filled with surface water from the adjacent lands, and the overflow found its way into the sluice by the stone wall down the ravine and across the highway on to plaintiff's land; that defendant dug a ditch from the ravine or waterway to said depression, which drained off the surface waters and emptied them into "the open water channel" whence they flowed northerly into the pond, and after filling the same thence northerly through the sluice across the highway into "an open ditch and watercourse which has existed on plaintiffs' land for the flow of surface waters for a period of time immemorial."

Del. Stow, for appellant.

C. H. Roys, for respondent.

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FINCH, J.—The principal force of the appellant's argument is directed to the point that there was no evidence of the existence of a watercourse upon the defendant's land, into which his ditches drained, and so the finding of the trial court to that effect was error. The argument would be irresistible if the finding meant or was intended to mean that there existed on defendant's land a watercourse as defined in the law. That means a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water. *Barkley v. Wilcox*, 86 N. Y. 144.

There was no proof in the case of the existence of such a stream. Everybody agrees that all the water running over defendant's premises was surface water and the product of rains or melting snow. But we do not so understand the findings excepted to. The learned judge describes the channel or watercourse formed by a natural depression of the land, but expressly says that it conducted nothing but surface waters. He speaks of it again as a "waterway," and in no respect finds that this channel or depression was a watercourse in its legal and technical meaning. The exception, therefore, was not well taken.

But upon the finding thus understood the appellants claim that they should have recovered, and that the judgment for the defendant was erroneous. In considering this question it is needed that we understand the issues presented and the course of the trial. The plaintiffs' cause of action was distinctly and definitely stated in their complaint. They alleged that a ridge of high ground runs west across defendant's farm and north of the swamp outlet and basin to which the new ditches ran, and such that all surface waters south of the barrier naturally flow to the south or remain stagnant and evaporated, and none of them flowed north toward plaintiffs' farm, or could so flow, except by the aid of artificial changes in the surface of the ground; that this protecting ridge or plateau was

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about twenty rods south from plaintiff's line; and that the defendant cut his ditch through this ridge, and thus turned upon them water which never before ran that way.

The defendant denied that he has cut through any such ridge or brought down upon his neighbors a new and unaccustomed drainage, and the issue thus framed was the issue tried and to which the findings were directed. The plaintiffs made no claim in their pleading that the defendant's ditch increased the natural and usual flow over their land and so they were injured, but claimed damages for a diversion of waters upon them which naturally ran elsewhere. They obtained a temporary injunction. The affidavit filed for that purpose states the case exactly as does the complaint, and seeks to shut off a foreign and artificial drainage. A perusal of the plaintiffs' proofs shows that they were confined to the issues pleaded. That evidence established that the surface water upon some part of defendant's land had always drained to the north, crossing the highway in a sluice which had long been maintained, thence following a ditch across plaintiffs' land and that of their neighbors, until it reached the Sodus ditch, described as the drainage channel for the waters in that region. There was no direct or specific proof that the defendant's ditch increased the normal flow of surface water over the plaintiff's land or that the faint trace of damage to their wheat was due to such increase, or had not equally occurred in former years. The plaintiffs' proposed findings follow the line of the issues and ask the court to determine that but for the cutting through the ridge or plateau none of the swamp or basin waters would have found their way to plaintiffs' lands; that the defendant diverted them unto plaintiffs' ditch and these waters occasioned the injury. The trial judge decided these issues in favor of defendant and with abundant evidence to sustain his conclusion. He found that the surface waters complained of had long flowed to the north following a natural depression of the

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ground and more or less found their way through the highway sluice into plaintiff's ditch; that some water from defendant's land had always flowed that way; and refused to find that any ridge had been cut through, or any new drainage area had been added to the natural flow. The court did find that defendant's drain had increased the natural flow, but described it as a slight increase and found that it had done the plaintiffs no substantial or material damage. These findings are conclusive. There was no cause of action alleged for an increase of the natural flow and if it existed the sufficient answer is that it did no damage. There may be still another answer founded on the circumstances of the case, but it is unnecessary to go further.

. We find no error in the judgment and it should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

LOUIS WINDMULLER *et al.*, Respondent, v. THOMAS J. POPE, Appellant.

Court of Appeals, December 6, 1887.

1. *Contract. Breach by vendee.*—Where the vendee, before the time of delivery fixed by a contract of sales of goods, notifies the vendor that he will not receive or pay for them, and advises him that he had better stop at once any further attempts to carry out the contract, the vendor is justified in treating the contract as broken by the vendee at that time and entitled to bring the action immediately for the breach, without tendering the delivery of the goods, or awaiting the expiration of the period of performance fixed by the contract; nor can the vendee retract his renunciation of the contract after the vendor had acted upon it and by a sale of the goods to other parties changed his position.
2. *Contract. Damages.*—The rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and

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pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery.

Action to recover for alleged breach of a contract to purchase a quantity of goods. Appeal from a judgment of the general term of the supreme court, affirming a judgment entered upon a verdict.

Carlisle Norwood, Jr., and W. W. Niles, for appellants.

Bernard Roelker and Cephas Brainard, for respondents.

PER CURIAM.—We think no error is presented upon the record which requires a reversal of the judgment.

The defendants having on the 12th of June, 1880, notified the plaintiffs that they would not receive the iron rails or eay for them, and having informed them on the next day that if they brought the iron to New York they would do so at their own peril, and advised them that they had better stop at once attempting to carry out the contract, so as to make the loss as small as possible, the plaintiffs were justified in treating the contract as broken by the defendants at that time and were entitled to bring the action immediately for the breach, without tendering the delivery of the iron, or a waiting the expiration of the period of performance fixed by the contract; nor could the defendants retract their renunciation of the contract after the plaintiffs had acted upon it and by a sale of the iron to other parties changed their position. *Dillon v. Anderson*, 48 N. Y. 231; *Howard v. Daly*, 61 id. 362; *Ferris v. Spooner*, 102 id. 12; *Hochster v. De La Tour*, 2 El. & Bl. 678; *Cort v. Ambergate, etc., Railway Co.*, 17 Ad. & El. 127; *Crabtree v. Messermith*, 19 Ia., 179; *Benjamin on Sales*, § 567, 568.

The ordinary rule of damages in an action by a vendor of goods and chattels for a refusal by the vendee to accept and pay for them is the difference between the contract price and the market value of the property at the time and

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place of delivery. *Dana v. Fiedler*, 12 N. Y. 40; *Dustan v. McAndrew*, 44 id. 72; *Cahen v. Platt*, 69 id. 848.

The just application of this rule to the circumstances in this case, requires that in computing the damages the defendants should be credited with the difference between the freight from Cronstadt to New York, fixed by the charter-party, less the sum which it cost the plaintiffs to be released from the charter, and also with any other expenses which the plaintiffs would naturally have incurred in performing their contract to deliver the iron in New York. The contract price being known, and the market price of the iron in New York at the time of the breach and subsequently having been proved, as also the sum which the plaintiffs paid for damages and expenses on account of the charter and the customary rate of insurance, the computation of the damages was a simple arithmetical problem. All these elements were before the jury and the verdict does not exceed, indeed it is less than the sum which, on the view of the evidence most favorable to the defendants, the plaintiffs were entitled to recover. The plaintiffs on the trial proved the market value of the iron at St. Petersburg, where it was at the time of the breach, and also that they sold it on the twelfth of July at a certain price. The plaintiffs also gave evidence of various expenditures made by them, which it is unnecessary to recapitulate. It is claimed that some of these items could not properly be considered in estimating the damages. Assuming that this may be true the fact remains, nevertheless, that the verdict is fully warranted by the competent and uncontradicted evidence. The amount of the verdict is justified whether the market value of the iron in St. Petersburg or New York is taken as a basis. The evidence also shows, without a contradiction, that on the resale the iron brought its full market value irrespective of storage, and it is not important to determine whether the plaintiffs could fix the market price by a sale without notice to the defendants.

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There is no merit to the defense and the exceptions are in the main technical and frivolous, and none of them, we think, require a reversal of the judgment.

The judgment is therefore affirmed.

All concur, except RAPALLO, J., absent.

ARBA BRIGGS, Appellant, v. JOHN LANGFORD *et al.*,
Respondents.

Court of Appeals, December 20, 1887.

Reversing same case, 35 Hun, 667, Mem.

Mortgage. Want of consideration. Evidence.—The defense of want of consideration is equally available, in favor of a grantee of the mortgagor who paid full value, against the assignee of a mortgage as against the mortgagee, though a *bona fide* purchaser; and evidence on the part of the grantee to prove that the mortgage was given for the purpose of defrauding the mortgagor's creditors, and upon no other consideration, is admissible.

Action to restrain the foreclosure by advertisement of a mortgage assigned to defendant.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered upon the report of a referee, dismissing the complaint upon the merits.

Wm. H. Henderson, for appellant.

Worthington Frothingham, for respondent.

ANDREWS, J.—We think that the trial court erred in overruling the offer of the plaintiff to prove that the mortgage was given for the purpose of defrauding the creditors of the mortgagor and upon no other consideration. The plaintiff paid the full value of the land upon the assurance of Day that it was free from incumbrances. Day is dead

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and his estate is insolvent, and there is no available remedy on the covenants in the deed. If the mortgage was without consideration it could not be enforced against Day, although it was given to cover up his property and defraud his creditors. *Wearse v. Peirce*, 24 Pick. 141.

The defense of want of consideration is equally available against Langford, the assignee of the mortgage, as against Heath, the mortgagee, for he stands in respect to the security in place of his assignor, and even if he is a *bona fide* purchaser, he is not exempt from the defense of want of consideration. *Jones on Mortgages*, § 843, and cases cited; *Bush v. Lathrop*, 22 N. Y. 535.

The plaintiff occupies a position quite as favorable at least as that of the mortgagor. He paid the full value of the land, and upon the plainest principles of justice he is entitled to assail the validity of any pretended liens thereon. Upon the facts found it is difficult to resist the suspicion that this is an attempt to enforce a void mortgage, and under cover of pretended transfers and assignments, to consummate a fraud upon the plaintiff. It is a case where all possible light should be thrown on the transaction.

The judgment should be reversed and a new trial granted.

All concur, except RAPALLO, J., absent.

SUSAN PETTIT, Respondent, v. ASA PETTIT, Appellant.

Court of Appeals, December 20, 1887.

Affirming same case, 37 Hun, 645, Mem.

1. *Husband and wife. Agreement.*—An agreement between husband and wife, during a separation and pending an action for limited divorce, that his property should be sold and, after deducting his debts, one third of the remainder paid to her and they were to live apart, is valid, and an action is maintainable to recover the portion of the proceeds agreed to be paid to her.
2. *Same. Consideration.*—Where the separation between husband and wife exists as a fact and is not produced or occasioned by the contract, the consideration of the husband's agreement to pay is his release from liability for the support of his wife.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered upon the decision of the court.

Josiah T. Mareau, for appellant.

G. S. Carpenter, for respondent.

FINCH, J.—The plaintiff and defendant are husband and wife, and at the ripe ages of eighty and seventy-three, and after a married life of almost half a century, have quarreled and separated. The wife brought an action for a limited divorce upon the ground of cruel and inhuman treatment. Pending the trial a settlement was agreed upon, to enforce which the present action is brought. The substance of that agreement was that the property, real and personal, of the husband, should be sold and converted into money, and after paying his debts to an amount not exceeding six hundred dollars, one-third of the balance remaining should be paid over to the wife, and the parties should live separate.

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The property was advertised for sale, as agreed, but before the sale the defendant, through his counsel, demanded the execution by the plaintiff of an agreement to be executed also by two of the sons expressly indemnifying the defendant against any liability for the support of the wife already incurred or that might hereafter accrue. His written contract gave him no such right, and failed to justify any such demand. The wife refused to sign unless the sons did, and they peremptorily declined. The husband indicated a purpose not to carry out his agreement unless the proposed indemnity was executed. In this condition of affairs the sale took place, and the land was purchased by one Schreiber for \$5,160, and the sale of the personal property brought the net proceeds up to \$5,701, and no more. A contract of sale by husband and wife was executed by them to Schreiber, but when the day for delivering the deed came around, the wife refused to sign except upon receiving her share of the money on the spot. To this she was not entitled, but her unfounded demand grew out of and was occasioned by the husband's unfounded demand of an indemnity.

Schreiber brought a suit to compel a delivery of his deed. Pending that, the new differences were settled by supplemental agreement that the wife should sign the deed and the husband deposit \$1,400 to abide the event of the present action, which was expected to be commenced. The costs in the Schreiber suit seem to have been satisfactorily arranged by an agreement with the wife's attorney to pay them out of any costs recovered by the wife in this action. The deed was accordingly signed and the money deposited.

The complaint in the present action sets out the original written agreement, alleges full performance on the part of the wife, and demands performance by the husband to the extent of the one-third of the net proceeds. The latter by his answer raised a new issue, claiming that he signed the agreement under a mistake produced by the

concealment of a material fact by the plaintiff. He avers that he did not know of any claim against him for the previous support of his wife; that two of his sons had such a claim to the amount of \$1,000, and the wife knew it; that when the agreement was being made the question was asked, what debts the defendant owed, and he answered \$600, and that amount was named in the agreement, the wife and sons concealing the fact of the existing claim for support.

The difficulty with this defense is, that it is untrue. It is not shown that at the date of the agreement the two sons had any such claim against their father in fact, or that they were conscious of such a right, or that the wife knew it, if it existed. No competent proof of any such facts was offered or given, and the requests to find prepared by the defendant's counsel to the number of fifteen, cover no such facts, and indeed, do not allude at all to the defense of mistake. It was thus plainly abandoned on the trial and has no proof to support it. The defendant did not even establish that such a claim had been made upon him subsequent to the agreement.

The questions remaining are as to the validity of the written contract and its force and effect. It is claimed to be against public policy, because by its terms the wife agrees to live separate and apart from her husband. In the pending action for divorce the plaintiff would have been entitled, if successful, to a decree of separation and a suitable allowance from the estate of her husband for her support and maintenance. It is difficult to see how it could be in accord with public policy to award such relief and yet against public policy for the husband to concede it in advance of the decree and as a compromise of the existing litigation. Public policy does not turn on the question whether the husband fights out the quarrel to final judgment. Where the separation exists as a fact and is not produced or occasioned by the contract, the consideration of the husband's agreement

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to pay in his release from liability for the support of his wife, *Calkins v. Long*, 22 Barb. 97; *Mann v. Hulbert*, 38 Hun, 27; *Carpenter v. Osborn*, 102 N. Y. 552; 2 N. Y. St. Rep. 520.

A further objection, that the contract was first broken by plaintiff, is answered by the fact already suggested, that her refusal to sign was induced by the unfounded demand of indemnity, and the further fact that she did finally perform, and the defendant has had and accepted the full benefit of such performance.

The judgment should be affirmed, with costs.

All concur, except RAPALLO, J., absent.

CORNELIUS S. GROOT *et al.*, Respondents, v. FREDERICK G. AGENS, Appellant.

Court of Appeals, October 25, 1887.

Pleadings. Parties.—Where one who ought to have been joined dies before the judgment is rendered, and the named plaintiffs fully own and represent the cause of action, the fact of such death obviates the defect of parties, and may be proved in reply to a plea in abatement, setting up the non-joinder.

Appeal from a judgment of the general term of the New York court of common pleas, affirming a judgment entered upon the report of a referee.

Thomas Darlington, for appellant.

Fithian & Clark, for respondents.

FINCH, J.—The complaint in this action contained two counts: One for the purchase and sale of stocks and advance of moneys and for commissions and interest, such purchases and sales having been made at the request of defendant,

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whereby the latter had become indebted to the plaintiffs in the amount claimed; and the other for the same amount upon an account stated. The answer served pleaded the non-joinder of Hopper as a party plaintiff in abatement of the action, alleging that he was a partner and jointly interested with the plaintiffs in the demand sued upon, and was living at the commencement of the action. Upon the trial the counsel for the plaintiffs, for the purpose of defeating the plea in abatement, asked a witness if Hopper was dead to which the defendant objected, giving as a reason "the matters arising subsequent to the commencement of this action, and not in discharge of the indebtedness therein created, are not admissible, especially when, in this case, a plea of abatement was interposed by reason of the fact that Mr. Hopper was living at the time when the answer was served."

The objection was overruled and the defendant excepted, and now claims that since the referee found as a fact that Hopper was dead at the date of the commencement of the action, the plea in abatement could not be defeated by the evidence objected to.

The point is extremely technical and without any merit behind it, and it is not unreasonable to treat very strictly the form of the objection. It was unsound on its face for two reasons. The question did not ask for a matter "arising" subsequent to the commencement of the action, but for an existing fact irrespective of the question when it arose or occurred; and the plea did not allege, as the objection assumed, that Hopper was living when the answer was served. There is no finding and no proof that Hopper was living at that date, and, unless he was, the plea of non-joinder had no force when it was made. But if that had been true we see no good reason for hesitating to say that proof of Hopper's death at the date of the trial was admissible and a complete answer to the plea in abatement. The object of that plea when founded upon a defect of parties plaintiff is.

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to give a better writ and so protect the defendant by a correct judgment. But, if before the judgment is rendered one who ought to have been joined is dead, and the named plaintiffs fully own and represent the cause of action there can be no better writ, and all force and effect is gone from the plea. The fact which has happened gives to the defendant the full benefit of his plea. He is exactly as safe as if Hopper had lived and the plaintiffs by amendment had joined him with them. If he had been joined originally, and then died, a mere suggestion on the record without amendment or supplemental pleading, would permit the action to proceed in the name of the survivors; and, on the other hand, where they alone sue, and the death of one who ought to have been joined obviates the defect of non-joinder, we see no reason why it may not be proved, and defeat the plea which has become useless and without merit.

No other question in the case requires consideration.

The judgment should be affirmed.

All concur.

MALVIN S. ROBINSON, Respondent, v. ANDREW H. FRANK,
Appellant.

Court of Appeals, November 29, 1887.

Contract. Refusal to perform.—An absolute and total refusal, never withdrawn, to manufacture and deliver machines under a contract, and a notification to that effect to the other contracting party or his agent, is an ample excuse and justification to the latter for his omission to make further demands or serve further notices, before bringing an action for stipulated damages.

Action brought to recover pay for machines not delivered under a contract to sell and deliver 1,500 drag sawing machines, which contained a provision that in case defendant should fail to manufacture and deliver the machines as pro-

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vided for and should remain in default for thirty days after written notice, then the plaintiff, without further notice, might sue for and recover four dollars for every machine not delivered. After delivering 100 machines, defendant absolutely refused to manufacture and deliver any more.

The defense was that the thirty days' notice was not given as prescribed in the contract.

Marshall, Clinton & Wilson, for respondents.

Rogers, Locke & Milburn, for appellants.

PER CURIAM.—Very likely the defendant is right in his construction of the terms of the contract, and that the notices were required in conformity with his views of its requirements.

We think, however, there was sufficient evidence upon which to base the finding of the trial judge that the defendant ceased and refused to manufacture the machines under the contract, and so notified the plaintiff or his agent. The refusal was absolute and total, and it is not pretended that defendant ever withdrew. It was ample excuse and justification to the plaintiff for his omission to make any further demands or to serve any other notices than the last one, which it is admitted or proved that he did serve. *Shaw v. Republic Life Ins. Co.*, 69 N. Y. 286.

There are no merits in the appeal and the judgment should be affirmed, with costs.

All concur.

ANDREW J. THOMAS, Appellant, v. GEORGE L. KINGSLAND,
et al., Respondent.

Court of Appeals, January 17, 1888.

Affirming same case, 12 Daly, 315.

1. *Lease. Keep in repair.*—Where a new roof was put on the premises the year before, and there is no proof that it had leaked or manifested defects up to the date of the tenancy, the covenant in the lease to put and keep in repair, does not necessarily imply that the roof was out of repair to the knowledge of the landlord; the defects occurring must be brought to his notice by the tenant.—
2. *Same. Charge.*—A request to charge “that, if the jury find that the plaintiff once notified the defendants that the roof was out of repair and leaking, it was their duty to put it in good repair and keep it in that condition during the entire time of the lease thereafter without further notice,” concedes the necessity of notice to make it the landlord’s duty to put the roof in repair, and is inconsistent with the claim that no notice was required.

Appeal from a judgment of the general term of the court of common pleas, in and for the city and county of New York, affirming a judgment in favor of defendants entered upon a verdict.

James Flynn, for appellant.

John A. Taylor, for respondent.

FINCH, J.—The covenant of the landlord was “to put and keep” the roof of the leased premises in good repair, and this action was brought to recover damages for an alleged breach of that condition. The specific injury was submitted to the jury, whether the defendants failed to repair the roof in question within a reasonable time after notice that repairs were needed, and the jury answered, “they did

not fail," and rendered a general verdict for the defendants. The plaintiff now argues that notwithstanding that finding, there should have been a recovery, because early in the tenancy, and before any notice of a leak was given, the roof was out of repair and the agreement to put it in repair as well as keep it so, was a confession that it was out of order to the knowledge of the landlord, and so no notice was necessary. The contention is inconsistent with the ground taken at the trial.

At the close of the charge of the court, and before taking the final exceptions to it, the defendant's counsel said: "Your honor charged that the defendants were not liable on their covenant to put and keep the roof in repair, unless notice was first given them to repair it, and they failed to do so after such notice. I now ask your honor to charge that if the jury find that the plaintiff once notified the defendants that the roof was out of repair and leaking it was their duty to put it in good repair and keep it in that condition during the entire time of the lease thereafter without further notice." That request conceded the necessity of notice to make it defendants' duty to "put" the roof in repair, and was inconsistent with the position now sought to be maintained. The exceptions afterward taken to the charge must be assumed to have been taken in harmony with the request, especially as they suggest nothing to the contrary.

But beyond this difficulty there is another. The covenant must have a natural and reasonable interpretation, and I do not think the phrase "put and keep in repair," necessarily implies that the roof was out of repair to the knowledge of the landlord. The term began May 1, 1879. A new roof had been put on the premises the year before. There is no proof that it had leaked or manifested defects up to the date of the tenancy. The first claim of damages in plaintiff's bill of particulars was under date of October, 1879, or about six months after the commencement of the

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term. The defects complained of were such as could not easily be discovered and might not be suspected until made manifest by rain or snow. The tenant in possession could thereby discover and locate them while the landlord remains in ignorance. Under such circumstances we do not think the appellant's proposition is sound. Fairness requires that unless the facts disclose a faulty roof known to the landlord, or at least which he ought to have known, that defects occurring should be brought to his notice by the tenant.

We think, therefore, no error was committed, and the judgment should be affirmed, with costs.

All concur.

THE METHODIST EPISCOPAL CHURCH HOME, Appellant, v.
WILLIAM N. THOMPSON, Respondent.

Court of Appeals, January 17, 1888.

Affirming same case, 52 N. Y. Super. 321.

1. *Title. Reasonable doubt.*—No fair, reasonable or just doubt is thrown upon the title to premises, where a clear title from the early governors of New York down to the present time with a continuous possession from 1836 to 1866, and no evidence of any possession since that time by any one adverse to this paper title, is shown.
2. *Same. Recover back purchase money.*—To maintain an action to recover the amount paid on account of a contract for the purchase of certain real estate, it is not necessary, it seems, to show an absolutely bad title. A reasonable doubt as to the vendor's title, such as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, will sustain the action. This rule obtains as well where the vendee sues to recover back the price paid, as when the vendor sues to compel performance.

Appeal from a judgment of the general term of the New

Opinion of the Court, by PECKHAM, J.

York superior court, affirming a judgment in favor of the defendant.

William F. MacRae, for appellant.

J. A. Beall, for respondent.

PECKHAM, J.—The plaintiff brings this action to recover the amount paid to the defendant on account of a contract for the purchase of certain real estate. The payment was made as a percentage upon the contract price for the purchase of the land, the balance of which was to be paid as provided for in the contract. The action was brought on the ground that the defendant could not give a good marketable title to the land in question.

The property consists of several lots on what is now Fourth avenue, between Eighty-eighth and eighty-ninth streets, in the city of New York. The plaintiff in its complaint alleges that there was a defect in the title; and to maintain the allegation on the trial of the action put in evidence the following papers: Deed from Patrick McKay to Elemuel Sheldon, dated October 2, 1818, which deed conveyed over seven acres, including the premises in question, which formed, however, but a very small part of the seven acres; deed from Elemuel Sheldon to Peter Zeily, dated December 29, 1828; deed from Zeily and wife to Joseph Parks, dated March 2, 1830; will of Joseph Parks devising his estate to his executors to be disposed of as directed by the will; order of the supreme court dated the 19th day of February, 1868, changing the trustees; a copy of the complaint in an action brought by the heirs of Joseph Parks in the United States district court for the southern district of New York, in which they claim to recover possession of the premises against William N. Thompson, this defendant.

The plaintiff then called a witness who testified that he had found upon investigation in the register's office of New York a deed from Oliver Waldron, Jr., and wife to Patrick

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McKay, dated the 7th of September, 1814, and that from a study of the maps and a consideration of the description in the deed, with which he was to some extent familiar, he thought the deed included the premises in question.

After proving the amount of money paid on the contract and the fees and expenses for examining the title and interest, the plaintiff rested, without proving any possession on the part of any one mentioned in the deeds above described, of any portion of the premises mentioned in such deeds.

The defendant then took the case and proved a complete paper title down to the present time, from a patent, dated in May, 1666, granted by Richard Nicholls, governor, etc., to the freeholders and inhabitants of Harlem; also his patent, dated the 11th of October, 1666, and the patent of Thomas Dungan, governor, etc., dated in March, 1686. He then proved possession under such title from 1836 up to 1866, when the three owners conveyed to Thomas Murphy, and there is no evidence of any possession since that time in any other than his grantees. Defendant also put in evidence the deed spoken of by the plaintiff's witness from Waldron, Jr., to McKay, and proved by a surveyor who surveyed the premises described in the deed that the land therein mentioned lay on the west side of Fifth avenue, by Ninety-first street, and all of it north of Ninetieth street, and no portion of it nearer than 1,200 feet from the premises in question. In answer to a deposition that was to be read on the part of the plaintiff, the defendant also proved that there could not be on the premises in question in this action a building that was not more than 300 or 400 feet west of Third avenue, and also, that a plot of ground 100 feet square and within 300 or 400 feet of Third avenue could not touch any part of this property.

The defendant then rested.

The plaintiff then proved by a grandson of Elemuel Sheldon, that in 1824 or 1825, there was some property in the

possession of his grandfather by a tenant under him and that the person from whom his grandfather got the property was Patrick McCoy. He further testified that about that time (1824 or 1825), he in company with some of his family went to this property by landing where the Astoria ferry boat now lands, and went up to what is now Third avenue, then called the Boston Turnpike, and then west 300 or 400 feet and came to a house on the premises of which his grandfather was in possession by his tenant, and that a fence enclosed the premises about 100 feet square; that it was 300 or 400 feet west or west by northwest from the Boston Turnpike, or what is now called Third avenue.

It is to this evidence that the evidence of the defendant was addressed when he proved by a surveyor that a spot of ground 100 feet square and within 300 or 400 feet of Third avenue could not touch any part of the property in question.

This is all the evidence that the plaintiff gave of any defect in the title of the defendant

It will be seen that at most, it originated in a deed from McKay to Sheldon, covering seven acres or over; that there is no evidence that McKay was ever in possession of any portion of these premises, or that he had any title to them, and the case is absolutely destitute of any proof that any of the grantees of McKay ever had possession of a single foot of these premises, or indeed of any of the premises described in the McKay deed.

On the other hand, is this clear title from the early governors of New York down to the present time with a continuous possession from 1836 to 1866, and no evidence of any possession since that time by any one adverse to this paper title.

Upon these facts we have no hesitation in saying that there is not a fair, reasonable or just doubt thrown upon the title of the defendant to the premises in question.

We disagree with the court at general term upon the necessity in such a case as this of showing that the title is

absolutely bad. We think that if there were a reasonable doubt as to the vendor's title, such as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, the plaintiff's cause of action would be sustained. *Hellreigel v. Manning*, 97 N. Y. 56.

This rule obtains as well where the vendee sues to recover back the price paid as when the vendor sues to compel performance.

The case of *Romilly v. James* (6 Taunton, 268), has been cited as authority for a contrary holding. This was an action brought to recover the deposit paid on the contract for the purchase of lands in fee simple upon the alleged insufficiency of the title. The question was argued at length in the common pleas, and at the end the court took time to consider, but before doing so observed: "It is said that the plaintiff will have made out his claim to recover back his deposit if a cloud is cast on the title. That is not so in a court of law. He must stand by the judgment of the court, as they find the title to be, whether good or bad; and if it be good in the judgment of a court of law, he cannot recover back his deposit." The court subsequently held that defendant could give a good title, and hence ordered judgment in his favor.

We do not regard this case as authority for us in our union of legal and equitable tribunals, to hold that in such a case as this the plaintiff must show absolutely a bad title.

In the case cited the court held the defendant's title good, and hence ordered judgment for him, just as we hold here, that no doubt has been cast upon the defendant's title. But the plaintiff was entitled to a good, marketable title, and if he did not get it, could maintain his action to recover back his deposit.

In *Allen v. Atkinson* (21 Mich. 35), COOLEY, J. said: (361) "The vendee has an undoubted right to a good title and to a deed with proper covenants; and he has a right also to insist that the title should be a marketable one, not

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open to reasonable objection." Citing *Freetly v. Barnhart*, 51 Penn. St. 279.

The case of *Romilly v. James* (*supra*), was the one upon which the superior court based its holding in *O'Reilly v. King* (28 How. Pr. 408), and this latter case was cited in the opinion delivered by the learned judge at general term in the case at bar. We think that case should not be followed.

But upon the ground that no such reasonable doubt exists in this case from the facts as disclosed at the trial, we think the judgment of the court below should be affirmed, with costs.

All concur.

ANNIE H. TANNER, Respondent, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Court of Appeals, January 17, 1888.

1. *Negligence. Jury.*—Where, in an action to recover for certain goods left in a car standing adjoining a freight house, the danger was palpable, and the company had reason to apprehend that the freight house might take fire at any time from a passing locomotive, the question whether the company exercised proper care and reasonable prudence in leaving the car exposed to the hazard of fire communicated from the freight house, is for the jury to determine.
2. *Same.*—The company is bound to protect the goods from unreasonable hazard from extrinsic dangers; and it is for the jury to say whether in any given case, this obligation is discharged.

This action was brought to recover the value of certain goods, delivered to the defendant, to be transported to Rome, which, after their arrival there, and while still in the freight

car, were destroyed by fire communicated to the car from the freight depot near which it was standing.

Appeal from a judgment of the general term of the supreme court entered upon a verdict.

C. D. Prescott, for appellant.

J. D. McMahon, for respondent.

ANDREWS, J.—We think the case was for the jury in two aspects, *first*, whether the fire which burned the freight house and the car containing the plaintiff's goods standing on the adjoining track was caused by sparks thrown from a defective engine; and, *second*, assuming that the engine from which the fire was communicated was in good order, whether the defendant was negligent in leaving the plaintiff's goods in the car exposed to the danger of fire from the burning of the freight house.

The evidence on the part of the plaintiff tended to show that the freight house was fired by sparks "half the size of a walnut" thrown from the engine of an east bound train upon the roof of the freight house, and that the fire ran down the roof in a number of places "like a stream of water."

The defendant gives no evidence as to the condition of the engine on this train, but apparently assuming that the fire was set by an engine on a west bound train which passed the freight house a few minutes after the east bound train, introduced evidence to show that the smoke stack and spark arresting arrangement of the west bound train were perfect, and that the fire could not have been set by sparks therefrom.

The evidence given by the defendant in respect to this engine would lead to the inference that proper precautions in the construction of an engine and in running a train would prevent the emission of sparks in the manner testified to by the witnesses for the plaintiff. The jury, there-

Opinion of the Court, by ANDREWS, J.

fore, in the absence of other explanation, might reasonably infer that the shower of sparks thrown by the engine on the east bound train, was owing to its defective condition or to the improper management of the train on the occasion in question. The burning of the car was, under the conditions existing at the time, a natural result of the burning of the freight house, and if that was attributable to the negligence of the defendant, it is responsible for the loss of the plaintiff's goods. If, however, the defendant is exempted from the imputation of negligence in respect to the condition of the engine or the management of the train, nevertheless it was bound to protect the plaintiff's goods from unreasonable hazard from extrinsic dangers, and it was for the jury to say whether this obligation was discharged in this case. The day was windy; the freight house was a wood building standing close to the track, with a sloping shingle roof covered with moss, and so constructed that sparks from a passing engine, when the wind was in the east or south, fell upon it. The roof had frequently, before the occasion in question, taken fire from sparks from passing locomotives, which was known to the defendant. The roof was very dry and highly inflammable, a high wind was blowing from the southeast, and the car containing the plaintiff's goods was left standing directly in the path of the flames which consumed the freight house.

It was, we think, under the circumstances, for the jury to determine whether the defendant exercised proper care and reasonable prudence in leaving the car exposed to the hazard of fire communicated from the freight house, the danger being palpable and the company having reason to apprehend that the freight house might take fire at any time from a passing locomotive.

The judgment should be affirmed.

All concur.

**ELIZABETH CROSS, Respondent, v. JOHN A. CROSS,
Appellant.**

Court of Appeals, January 17, 1888.

Affirming same case, 37 Hun, 643, Mem.

1. *Witness Credibility.* A party, by calling his adversary as a witness, is not forced to admit as true every fact to which he testifies. Though not at liberty to impeach his character for truth, he may dispute specific questions sworn to by him; and the trial court has a right to confront the statement of his mental conclusion with the facts and circumstances of his conduct, his letters and declarations, and determine, from the whole evidence, the issues involved.
2. *Foreign judgment. Divorce.*—A foreign judgment against one who, at the time it was rendered, was domiciled in this state, was not served with process, did not appear in the action, and had no actual notice of its existence until a copy of the final decree was served upon her, is void.
3. *Same. Recitals.* Recitals in such a judgment that the plaintiff therein was a resident of the state in which the judgment was rendered, are not conclusive; and it is competent to attack the jurisdiction of the court, and question the truth of the foreign residence.

Action for limited divorce on the ground of abandonment.

Appeal from a judgment of the general term of the supreme court, affirming a judgment in favor of plaintiff, entered at special term.

George C. Reynolds, for respondent.

Benjamin F. Tracy, for appellant.

FINCH, J.—The question of abandonment in this case is very close and quite open to debate. That a separation

Opinion of the Court, by FINCH, J.

occurred, evincing a settled determination of the parties to live apart, is beyond question; but whether the result sprang from an abandonment of the wife by the husband, or of the husband by the wife, is a difficult inquiry but purely a question of fact. The appellant seeks to avoid that consequence and opens the merits for review in this court by insisting that when the plaintiff called the defendant as a witness she gave him credit as such and so became bound by his evidence that he did not abandon his wife, and sought in good faith and patiently a restoration of their marital relations. But by calling him as a witness the plaintiff did not become forced to admit as true every fact to which he testified. While not at liberty to impeach his character for truth she was at liberty to dispute specific facts although sworn to by him, and the trial court had the right to confront his statement of his mental conclusion with the facts and circumstances of his conduct, his letters and declarations, and determine from the whole evidence whether he did form a settled determination to abandon his wife. He was both a hostile and a deeply interested witness, and all his testimony was a proper subject of consideration with freedom to believe or doubt and reject. This doctrine we have quite recently asserted in *Becker v. Koch* (104 N. Y. 394; 5 N. Y. State Rep. 688). The question there was one of fraudulent intent, and respected the purpose of the witness, and his statement of honesty and innocence was uncontradicted except by the logic of facts and circumstances and the force of natural inferences. In like manner here it was competent to confront the statement of the witness adverse in interest, hostile in feeling, married to a new wife and fretted by the old entanglement and deeply interested in maintaining his own view of the quarrel, with the facts occurring at the time and the inferences founded upon them; and so the question remained one of fact, and whatever we might ourselves think, we are not at liberty to distrust or review the result.

Opinion of the Court, by FINCH, J.

A judgment of divorce obtained by the defendant in Illinois, was put in evidence by him as an answer to the plaintiff's cause of action. When it was rendered, and during the pendency of the suit, the defendant was domiciled in this state, was not served with process, did not appear in the action, and had no actual notice of its existence until a copy of the final decree was served upon her. The cases of *People v. Baker* (76 N. Y. 78), and *O'Dea v. O'Dea* (101 id. 23) are decisive upon this point and bar the further discussion to which the appellant invites us.

It is also claimed that the court erred in admitting evidence to show that defendant was not a resident of Illinois when he obtained his decree. The jurisdiction of that court was open to assault in spite of the recitals in the judgment, and so it was competent to question the truth of the foreign residence. *Kerr v. Kerr*, 41 N. Y. 272.

If the plaintiff had appeared in the Illinois action, or ought to have so appeared, and the question of residence had then been litigated, the decision of the court might have been conclusive, but since no process was served upon her in this state, and she had notice of the action, she had no opportunity to be heard and is not barred by the finding of the decree.

Some other questions have been examined, but do not require discussion.

The judgment should be affirmed, with costs.

All concur.

JOSEPH BROPHY, Appellant, v. EDWARD B. BARTLETT,
Respondent.

Court of Appeals, January 17, 1888.

Reversing same case, 37 Hun, 642, Mem.

Master and servant. Question of fact.—Where, in an action to recover damages for injuries alleged to have been sustained by plaintiff through defendant's negligence, the evidence admits of different and discordant inferences as to whether or not plaintiff was defendant's servant, and as to whether or not a person whom plaintiff claimed hired him was an independent contractor, or an employee of defendant, they are both questions of fact, and should, under proper directions, be submitted to the jury.

Action for injuries alleged to have been incurred by plaintiff through the negligence of defendant.

Appeal from a judgment of the general term of the supreme court, affirming a judgment dismissing the complaint at the circuit.

J. Stewart Ross, for appellant.

James Moffett, for respondent.

FINCH, J.—The evidence in this case admits of different and discordant inferences. One is that the plaintiff was not employed by anybody to work upon the dock, until directed to use a truck by the foreman of the defendants, and so became the defendant's servant; while the other, which led to the nonsuit, was that he remained the servant of Rawle, or if he became that of Devanny, no liability attached since the latter was an independent contractor to do the trucking. The question of the true relations of the parties to each other seems to us to be a mixed question of law and fact, not to be solved without the aid of a jury.

Opinion of the Court, by FINCH, J.

The plaintiff appears to have been in the employ of Rawle, who kept horses for hire. Devanny, needing a horse for his work, hired one of Rawle. The latter seems to have understood that this implied a driver as well as a horse, and sent Brophy, the plaintiff, with the horse to work upon the dock. But Devanny swears that he hired only the horse and paid only for that and never at all took plaintiff into his employ. If that was true, the plaintiff had no duty on the dock, except to deliver the horse to Devanny and then go back to his master. But he stayed in charge of the horse and the foreman of defendants, doubtless supposing him to be one of Devanny's men, set him at work with the truck, which is alleged to have been defective and from which the injury arose. If the evidence of Devanny is believed to its full extent, the plaintiff never was employed by anybody to work on the dock, unless by the foreman of defendant, for Devanny did not hire him, nor authorize Rawle to so set him at work. A jury might very well take Devanny's statement as doubtful, in view of the facts, and conclude that when he hired the horse it was implied and understood that a man was to come with the animal to drive and manage it, but we cannot disregard the direct and explicit testimony of the witness.

If, however, Brophy was hired by Devanny, there yet remains the question whether the latter was an independent contractor.

The evidence again admits of different inferences. He supplied his own men and horses, and was hired by the hour to do all of defendant's trucking, but he seems to have been under the control of their foreman and subject to his orders and direction, both as to what to do and how to do it, and some of the proof warrants the idea that the foreman had authority over Devanny's men. The whole arrangement was verbal and it is not easy to reconcile the conflicting inferences.

We are of opinion, therefore, that both questions re-

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ferred to under proper directions from the court should have been submitted to the jury.

The judgment should be reversed, and a new trial granted, costs to abide the event.

CATHARINE SHOOK, Respondent, v. THE CITY OF COHOES,
Appellant.

Court of Appeals, February 10, 1888.

Affirming same case, 38 Hun, 641, Mem.

1. *Negligence. Questions for jury.*—In an action to recover damages for personal injuries caused by falling upon a sidewalk in one of defendant's streets, upon which a quantity of earth had been deposited, the trial court cannot, as a matter of law, properly rule that plaintiff was guilty of culpable imprudence in attempting to pass over the obstructions upon the sidewalk, though they were known to her.
2. *Same.*—Whether upon the whole evidence the obstruction had existed for such a length of time that the defendant was guilty of negligence and in fault for not taking notice of it and removing it, was also a question for the jury.
3. *Municipal Corporation. Obstruction.*—Where earth is deposited upon a sidewalk by an adjoining owner, where there is abundant room upon his land for its deposit, *prima facie* its deposit upon the sidewalk is unauthorized and therefore wrongful.
4. *Same.*—Where defendant's superintendent has actual notice of such wrongful deposit, it becomes its duty at once to arrest further deposit, and remove what had been placed there.

Action to recover damages for personal injuries caused by falling upon a sidewalk of one of defendant's streets, upon which a quantity of earth had been deposited. It was raining at the time and the sidewalk was slippery and muddy.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered on a verdict.

Opinion of the Court, by EARL, J.

P. D. Niver, for appellant.

J. H. Clute, for respondent.

EARL, J.—Whether the plaintiff was guilty of negligence contributing to the accident, was a question of fact for the jury. The trial judge could not properly rule, as a matter of law, that she was guilty of culpable imprudence in attempting to pass over the obstructions upon the sidewalk, although they were known to her. *Pomfrey v. Village of Saratoga Springs*, 104 N. Y. 459; 5 N. Y. State Rep. 802. Whether she could pass over them in the exercise of proper care, or whether she was bound to go around them into the muddy street, were questions of fact for the jury.

The earth was thrown upon the sidewalk by an adjoining owner, who was engaged in building a trench and postholes for a fence upon the line of his lot. The evidence on the part of the plaintiff tended to show that this obstruction upon the sidewalk had existed for about ten days, but on the part of the defendant there was evidence tending to show that the trench and postholes were dug and the earth thrown out upon the sidewalk on Friday and Saturday prior to the Sunday morning upon which the accident happened, and that the work was finished on Saturday afternoon. Whether upon the whole evidence the obstruction had existed for such a length of time that the defendant was guilty of negligence and in fault for not taking notice of it and removing it, was also a question of fact for the jury.

Counsel for the defendant requested the court to charge as follows: "If the jury believe that the dirt was all thrown upon the sidewalk upon the Friday and Saturday before the accident which occurred on Sunday, then the city is not guilty of negligence." The court refused to charge this request, but did charge that it was for the jury to determine whether reasonable time had elapsed in which notice should be taken. To this refusal defendant's counsel excepted. This exception presents no error.

Opinion of the Court, by EARL, J.

It must be assumed that this earth was wrongfully placed upon the sidewalk. It is true that if there was any necessity for placing it there, temporarily in order to enable the adjoining owner in a reasonable manner to construct his fence, then it was justifiable. *Callanan v. Gilman*, 107 N. Y. 360; 12 N. Y. State Rep. 21. But in order to justify this obstruction, if the adjoining owner had been sued, it would have been incumbent upon him to show that it was necessary and reasonable under the circumstances. Here there was no proof of any necessity, whatever, for the deposit of this earth upon the sidewalk. For aught that appears there was abundant room upon the land of the owner for the deposit of this earth, and it is reasonable to suppose that there was. *Prima facie* its deposit upon the sidewalk was unauthorized, and hence it must be assumed for the purposes of this case that it was wrongfully deposited there. There is uncontradicted evidence on the part of the plaintiff that during the time of the excavation of this earth and at the time of its deposit upon the sidewalk the defendant's superintendent of streets was present and saw what was being done. If that evidence was believed it showed actual notice of this wrongful deposit of the earth upon the sidewalk to the defendant, and it at once became its duty to arrest further deposit, and remove what had been placed there. Hence there was a fair question for the jury to determine whether there was any negligence chargeable to the defendant in permitting this earth thus wrongfully deposited upon the sidewalk, to remain there, and the trial judge could not properly have charged as requested.

The judgment should be affirmed, with costs

All concur.

JAMES BLACK, Respondent, v. THE BROOKLYN CITY R. R. Co., Appellant.

Court of Appeals, February 7, 1886.

1. *Negligence. Question for jury.*—A proposition, depending upon conflicting evidence, is a question of a fact, and, when properly submitted to the jury, the court of appeals is bound by their opinion.
2. *Same. Submission.*—Where two propositions are submitted to the jury, the one properly, the other, improperly, not having any fact for its support, and the court of appeals cannot tell on which alternative of the charge the jury founded their verdict, it cannot be supported.
3. *Same. Duty of company.*—It is the duty of a street railroad company, in the exercise of its franchise, to offer the intending passengers a reasonable opportunity safely to board its cars.

Appeal from a judgment of the general judgment of the supreme court, affirming a judgment entered upon a verdict, and affirming an order denying a motion for a new trial.

Samuel D. Morris, for appellant.

E. B. Convers, for respondent.

DANFORTH, J.—The defendant was incorporated for the business of owning and operating horse cars for the carriage of passengers for hire. The plaintiff alleges that while lawfully attempting as an intending passenger to get upon one of the defendant's "down cars," and actually being on one of the steps of its platform, he was thrown from it toward the street, and in that way and by collision with another or "up car," of the defendant, moving in the opposite direction, was severely injured. Concerning these alleged facts there is no doubt.

The defendant by its answer and evidence raises two questions :

First. Whether the negligence of its servant caused the injury.

Second. Whether the plaintiff contributed to it. It appears that the plaintiff in due season signaled the approaching or "down car" and it stopped ; that as he was getting on board, having one foot on the lower step, the car, on signal of the conductor, was suddenly started. His further ascent was thus interrupted and by the rapid motion of the car he lost his foothold and was thrown off. He shows that the platform was crowded, and that by reason of the sudden shock he was unable to reach it with either foot or get hold of the hand-rail. Whether by either of these circumstances—the condition of the platform, his omission to take the rail, or enter upon the platform, he was in fault or acted negligently, was submitted to the jury and, as their verdict shows, was answered in his favor. The proposition depended upon conflicting evidence and was therefore a question of fact, as was also the other, viz. : The negligence of the defendant's servant on that car, and by the opinion of the jury this court is bound. *Clark v. Eighth Ave. R. R. Co.*, 86 N. Y. 135 ; *Hayes v. Forty-second Street R. R. Co.*, 97 id. 259.

It was undoubtedly the duty of the defendant, in the exercise of its franchise to offer to intending passengers a reasonable opportunity safely to board their cars. The charge did not go further and the evidence warranted a conclusion that such care was not exercised toward the plaintiff and that the plaintiff himself was not in fault. The trial judge, however, called the attention of the jury to the plaintiff's allegation in relation to the conduct of the servants in charge of the "up car," and refused to charge as requested by defendant's counsel "that negligence could not be predicated on anything the driver of that car did or omitted to do."

Upon this refusal the appellant alleges error The

Opinion of the Court, by FINCH, J.

learned judge said: "As to the up car, the only allegation of negligence concerning the management of that vehicle is that the driver did not perceive, when he ought to have perceived the plaintiff falling from the car that was coming down," and then said: "If the driver fulfilled the duty which was incumbent upon him to keep a vigilant watch on his team and of the road ahead so as avoid injuring any one, he performed his whole duty," adding: "The driver, himself, tells you that he was looking straight ahead at his team; it is for you to say whether, under the circumstances, if the driver of the up car was doing that, that he did not do his whole duty."

We find no evidence as to the conduct of this driver which would permit any other conclusion so far as his duty to the plaintiff is concerned. There is, indeed, testimony that his way being blocked by a coach intruding upon the track, the driver of the up car was speaking to or chaffing with its master at the very moment of or just before the accident, but we find no connection between that circumstance and the plaintiff's injuries. It does not appear to have affected his management of the car, nor that the management was in any respect other than the circumstances in which he was placed required. The complaint, however, alleged negligence in the management of the down car. Both charges were submitted to the jury, the last, as we have said, properly; the other, in respect to the "up car," we think improperly, it having no fact for its support; and as we cannot tell on which alternative of the charge the jury founded their verdict, we are of opinion it cannot be supported.

The judgment, therefore, should be reversed and a new trial granted, with costs to abide the event.

All concur.

GEORGE W. VARIAN, Respondent, v. ROBERT A. JOHNSON,
Appellant.

Court of Appeals, February 10, 1888.

Affirming same case, 38 Hun, 642, Mem.

1. *Appeal. Finding.*—The finding of the trial judge on a question of fact upon the evidence, confirmed by the general term, concludes the court of appeals.
2. *Same. Defense not set up.*—The appellant cannot succeed, on appeal, upon a defence not set up in his answer, and not even alluded to in any way at the trial.
3. *Contract. Waiver.*—Where, in an action on a building contract, the refusal to pay by the owner, when the demand was made by the builders upon him for payment before the commencement of the action, was not put upon the ground that any dispute should first be settled by the architect or by the arbitrators, such defense cannot prevail.

Appeal from a judgment of the general term of the supreme court, affirming a judgment entered at special term.

E. Countryman, for appellant.

Ralph. E. Prime, for respondent.

EARL, J.—In July, 1884, the plaintiff, a builder, entered into a written contract with the defendant to build for him a barn for the price of \$2,000. The contract provided for extra work to be performed by the plaintiff for a fair and reasonable valuation, and further contained this clause: "Should any dispute arise respecting the true construction or meaning of the drawings or specifications, the same shall be decided by Henry O. Avery, architect, and his decision shall be final and conclusive; but should any dispute arise

Opinion of the Court, by EARL, J.

respecting the true value of the extra work, or of the works omitted, the same shall be valued by two competent persons, one employed by the owner, and the other by the contractor, and these two shall have power to name an umpire, whose decision shall be binding on all parties." After the plaintiff claimed that he had performed the contract on his part, he demanded of the defendant the balance due him therefor and for the extra work, and payment having been refused he brought this action to recover such balance.

In his complaint the plaintiff alleged that he entered into the contract to construct the barn; that the defendant agreed to pay him therefor the sum of \$2,000; that he had fully performed his contract and that the defendant had not paid him in full therefor, but that there remained due and unpaid to him upon the contract \$800, with interest. He also alleged that he had performed certain extra work for which there was also due him the sum of \$392.88, and interest; and he demanded judgment for the two sums. In his answer, the defendant admitted the making of the contract, the demand of payment, the performance by plaintiff of certain work and the furnishing of certain materials not included in the contract; and he denied every other allegation contained in the complaint. As a separate and distinct defense and as a counterclaim, he alleged that the plaintiff had failed to perform the contract on his part; that the work was done in a defective and unworkmanlike manner, with unsuitable materials; that the work and the materials were not such as were called for or required by the terms of the contract; that some of the work and materials called for by the contract were not furnished at all, and that he had been put to expense and trouble in supplying the defective work and materials and would be compelled to expend further sums in the same way to the extent of \$450 in all; that the plaintiff had failed to complete the work within the time specified in the contract, on which account the defendant had also suffered damages. And he demanded

a dismissal of the complaint and judgment for the sum of \$1,950, against plaintiff, besides interest and costs.

Upon the evidence it was a question of fact whether the plaintiff had fully performed the contract on his part, and the finding of the trial judge that he had fully performed it, confirmed by the general term, concludes us. We are, also, concluded by the finding of the judge as to the extra work and the value thereof.

The main reliance of the defendant upon this appeal is based upon the clause in the contract above set out. But we are of opinion that that clause furnished him no defense.

The decision of the architect was not to be invoked, unless a dispute should arise, "respecting the true construction or meaning of the drawings or specifications," and the plaintiff was not obliged to submit to such decision, unless there was such dispute. There is no allegation in the answer that there was such dispute or that the plaintiff had failed or refused to submit any dispute to the architect, and, therefore, the defendant cannot invoke that clause in the contract for a reversal of this judgment. He cannot succeed upon this appeal upon a defense not set up in his answer, and not even alluded to in any way at the trial.

These observations apply with equal force to the other clause of the contract providing for the valuation of extra work, in the case of dispute, by arbitrators. There is no allegation in the answer that there was such dispute or that the plaintiff refused to submit any such dispute to arbitration, or that the defendant ever offered to submit the dispute to arbitration, and there was no proof of any refusal on the part of the plaintiff, or any offer or request on the part of the defendant to submit the valuation of the extra work to arbitration. The refusal to pay the plaintiff, when the demand was made by him for payment before the commencement of the action, was not put upon the ground that any dispute should first be settled by the architect or by arbitrators, and the defense cannot now prevail. *Sinclair v. Tallmadge*, 35 Barb. 602; *Smith v. Alker*, 102 N. Y. 87.

Opinion of the Court, by FINCH, J.

A careful examination of the whole case leads us to the conclusion that no legal error was committed upon the trial, and that the judgment is just and should be affirmed, with costs.

All concur.

**THE PEOPLE OF THE STATE OF NEW YORK, Respondent,
v. ROBERT VAN BRUNT, Appellant.**

Court of Appeals, February 28, 1888.

Affirming same case, 11 N. Y. St. Rep. 59.

1. *Criminal law. Appeal.*—Where an appeal to the Supreme Court was taken before the amendment of 1887 to section 528 of the Code of Criminal Procedure, but the appeal to the court of appeals, after its enactment, the latter court will construe the terms of the amendment distributively, and will not deny to the prisoner the review upon the facts, which he seeks, by any nice or critical construction of the amendment.
2. *Same. Deliberation.*—The facts and circumstances of this case were held sufficient by the court of appeals to establish reflection and deliberation in the commission of the homicide.

Appeal from a judgment of the general term of the supreme court, affirming a judgment upon conviction of the defendant, at the oyer and terminer, of the crime of murder in the first degree.

L. W. Thayer, for appellant.

E. M. Bartlett, for respondents.

FINCH, J.—The defense of the prisoner was confined solely to the degree of his crime. The killing was conceded, and no attempt was made to justify or excuse it, but the whole contest at the trial turned upon the inquiry whether the act was deliberate or a sudden and unreflect-

ing outbreak of passion. Evidence was given tending to show that the defendant was subject to severe headaches, and fits resembling the known effects of epilepsy, and that he had made one or two attempts at suicide, but no claim or defense of insanity was interposed. These circumstances were relied on to make more probable the prisoner's testimony that he fired the shot which took the life of William Roy without forethought and upon an instantaneous impulse. The jury, however, were so satisfied that the act was characterized by some degree of deliberation as to have disbelieved his statement to the contrary; and they rendered a verdict of murder in the first degree which the general term have affirmed.

The prisoner asks us to review the facts under the law of 1887, amending section 528 of the Code of Criminal Procedure, and to determine upon such review whether the verdict shall stand. The prosecutor insists that the amendment, by its terms, has no application to this appeal, and relies upon its provisions that "the amendments herein shall not affect any appeal taken to or pending in the supreme court or court of appeals at the time this act shall become a law." The appeal to the supreme court was taken before the amendment, but that to this court after its enactment. It is possible to construe the terms of the amendment distributively, and we think we ought to do so and not deny to the prisoner the review upon the facts which he seeks by any nice or critical construction of the amendment. Nevertheless, after having read carefully the whole of the evidence given upon the trial, we have reached the same conclusion upon the question of deliberation which prevailed with the jury.

The prisoner's jealousy of the deceased was no new or sudden emotion. It had for weeks occupied his thoughts and filled him with hatred for the half-brother whose death he finally effected. It had broken his sleep and made him unhappy and miserable according to his own account. His

Opinion of the Court, by FINCH, J.

imagined injury took two forms. He believed that the deceased was using his influence as a brother to induce his sister, to whom the prisoner was engaged, to break that engagement and retreat from the promised marriage, and was continually preventing by his presence the personal interviews which the defendant sought with Eva. The other and more remarkable suspicion was that Roy was pursuing his half-sister as a lover and with her knowledge, for he says that she admitted to him that she had become satisfied that such was the fact. She was recalled by the prosecution after the prisoner had testified in his own behalf, and denying the truth of some of his statements, was silent as to this. The anger and resentment thus born and fostered evidently gained the mastery of a suspicious and unbalanced mind. It produced, as we are told by his own declarations to others, a warning given by him to the deceased that his interference was dangerous, and led, not unnaturally to the events of the fatal night. Using a pistol, threatening to shoot an intruder upon his courtship, were things not unfamiliar to his thoughts, for Eva testified to such a threat against her own father, and another against a chance visitor.

On the night of the murder the prisoner had gone upstairs to his room, while Eva and Will had passed into the sitting-room. He had acquired the bad and evil habit of carrying about with him, at least in the evenings, a loaded pistol. He had produced it when he asked Eva to marry him and indulged in some wild talk that they would have to live together or die together, and that he would shoot her if she did not consent to marry him.

Evidently here was a man, perhaps not wholly meaning all that he said, but quite too fond of thinking and talking about shooting, and liable to underrate the enormity of the offense. His habit was to leave his revolver in the day-time on the secretary or in the pocket of his overcoat hanging in his room, but to put it in his hip-pocket as a rule,

when he went out at night. He says he did so on that night, but when he came in and undressed for bed it would be quite natural for him to take out the pistol and put it one side as no longer needed to avoid the danger of dropping it from his pocket or exploding it by careless or thoughtless handling of his clothing.

He declares that when he reached his room he undressed and went to bed and fell asleep. As his custom was to leave his revolver in his room through the day, it would naturally be also his custom to take it out of his hip pocket and lay it aside as he prepared for bed. Fred Roy, who was his room-mate and slept with him, says that was his habit. He further testifies that the prisoner did not come to bed, but he depends partly upon inference, and may be mistaken. The prisoner says he was awakened, and heard whispering downstairs, and, without knowing who it was, got up and put on his socks and pantaloons and began an endeavor to ascertain what was going on. He listened first at a stovepipe hole, and, unable to hear, stole silently in his stocking feet down the stairs. Eva saw him and describes him as peeking from the foot of the stairs. He tells us that he knocked down something which made a noise, and since they would know from the sound that some one was coming he went back to his room. Eva heard him go back to his room after she had seen him looking at them from the stairway. His suspicions had been verified. The persons he saw were Eva and her half-brother, and she sitting near him in her night dress. He did not know that she had innocently put it on over her ordinary clothing, and to his jealous suspicions and hot temper we can imagine the effect of the discovery. Why did he go back to his room? If "fired with jealousy," as he says, and acting from impulse and without reflection, why did he not burst out upon them at the first view of what seemed to him the situation? The inference that he went back to get his revolver appears to us very strong. In describing the events of the night to

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the witness Davis he said "he mistrusted it was young Roy talking with Eva and he took his revolver in his hand and started downstairs." Eva describes him as peeking out at them twice before he made his appearance. After having gone back to his room he came down again and walked into the sitting-room and stopped in front of the pair. He describes what he saw or believed that he saw. There was the girl who had promised to be his wife sitting by the sewing machine in her night dress, and her half-brother, suspected of being her lover, sitting near with his arm about her shoulders.

To the jealous and angry temper of the prisoner the sight was calculated to evoke a burst of passion, unless controlled by reflection and restrained for the accomplishment of a further purpose. The passionate outbreak did not come. Where he stood, the eyes of Eva and Will were upon him. The latter was strong and athletic and not likely to be shot down without resistance if he saw the weapon in advance. Standing there the prisoner utters only this remonstrance: "Eva, I thought your ma wanted you to go to bed some time ago; now you are sitting up here at this time in the morning." Eva answered that her mother had allowed her to come out and talk with Will because he was going on the midnight train. In this quiet and almost timid remonstrance there is no trace of sudden passion, unless covered and concealed for an ulterior purpose. He spoke to the girl after having simply expressed his surprise to the man that he had not gone on the midnight train. Then he passes around Will in a half-circle and takes a position which brings him no longer in front of, but at the side of each; a position behind the sewing machine and a stand near it, in which a pistol could be drawn and aimed with a safety from observation and interference, which while standing in front could not be obtained. Eva asks Will where he is going. He replies, lean over and I will tell you. As their heads approach and their attention is diverted, the prisoner sees

his opportunity, and reaching his revolver across the sewing machine and quite near to his victim's head, shoots him through the temple. Describing the scene afterwards, he says "I shot to kill." The remarkable thing about his assertion of a sudden impulse prompting to the murderous act is this : that when such impulse would have been natural and might have been expected, it did not come ; and when the moment for such impulse had passed and no new event sufficient to provoke it had occurred, it made its tardy appearance. His change of position, as the general term suggests, was quite significant. He was asked to explain it, and give his reason for the movement, but answered only that he did not know. Not only in these facts was there time in abundance for reflection and deliberation, but from the moment that he took his pistol and stepped softly and tried to step silently down the stairs, it seems possible to trace the purpose and plan which unfolded itself in his movements and ended in the murder.

- Taking all the facts together and making every allowance for the peculiar mental organization of the prisoner, we are yet constrained to say that the jury did not err in their verdict.

The judgment should be affirmed.

All concur.

Opinion of the Court, by DANFORTH, J.

LILLA L. WHITE, Respondent, v. MILTON S. PRICE *et al.*,
Appellants.

Court of Appeals, February 28, 1888.

Affirming same case, 39 Hun, 394.

1. *Parties.*—A nun, who, on uniting with a society, assents to a regulation that property of the members belongs to the society, does not thereby, it seems, make any transfer effectual even between the parties, and may subsequently bring an action upon an existing claim.
2. *Evidence. Secondary.*—In order to show that the plaintiff was not the owner of the claim sued on, parol evidence that whatever property the members of her order had on joining the society, then belonged, under written regulations, to the society, was secondary, and, under objection, properly excluded.

Appeal from a judgment of the general term of the supreme court, affirming a judgment in favor of the plaintiff; entered upon the decision of the court.

Louis Marshall, for appellants.

William G. Tracy, for respondent.

DANFORTH, J.—The opinion of the court at special term, and the opinion of the general term on appeal from its decision (39 Hun, 394), sufficiently justify the judgment now before us, unless the trial court erred in rejecting, against the objection of the defendant, certain evidence which, as the appellant now contends, would show that the plaintiff had parted with all her interest in the property involved in this action. The testimony of the plaintiff, taken before the trial, shows, among other things, that she was a nun of the Roman Catholic church, “and a member of the Society of the Sacred Heart.” Upon cross-examination by defendant’s counsel she said: “Everything is in

Opinion of the Court, by DANFORTH, J.

common with us, nothing belonging to ourselves." Asked: "Is there any condition as to the distribution of property belonging to one entering the sisterhood?" The plaintiff objected as immaterial and incompetent and she said: "Whatever property we have after our vows are taken, belongs to the society." She also stated that the regulations in regard thereto were printed, that each member had a copy, and that she, in joining the society, agreed to "perform all the regulations laid down in the order." The objection was renewed, "that the evidence is inadmissible on the ground that it is secondary, the regulations being in writing." She stated that she brought the action because "I thought it was my duty to the society to which I belonged to do it."

The testimony indicates only that so far as might be she had ceased to be earthly-minded and, with a desire to be wholly occupied with her future obligations, was willing to devote her substance to the interest of the order to which she belonged. It fails to prove any transfer effectual even between the parties, and goes no farther than to show a subjection of her will, but no manifestation of it by any legal or valid form. No transfer of title was established, if we take her words in the broadest sense. But in any view the objection that better evidence existed as to what she had really done, was a good one, and the trial judge committed no error in sustaining it. The plaintiff's cause of action was meritorious, her resort to a court of equity necessary; the points made against her recovery are, in view of the consideration already given to them by the court of original jurisdiction and by the general term, invalid, and suggest no reason for a continuance of the litigation.

The judgment appealed from should, therefore, be affirmed.

All concur, except RUGER, Ch. J., not sitting.

Statement of the Case.

CHARLES W. ROMEYN, Respondent, v. DANIEL E. SICKLES,
Appellant.

Court of Appeals, February 28, 1888.

1. *Pleadings. Amendment.* Pleadings cannot lawfully be amended in a material respect except at a time which will give the party, against whom the amendment is allowed, a right and opportunity to meet by proof the allegations made against him.
2. *Same.*—When an objection has been properly taken, or an exception presents the question, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings.
3. *Same. Secundum allegata et probata.*—It is a fundamental rule that judgment shall be "*secundum allegata et probata*," and departure from this rule is certain to produce surprise, confusion and injustice.
4. *Contract. Unforeseen contingencies.*—Where, in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and consequently where no intention has been expressed by them or can be inferred from their acts, the inquiry in such cases always is what the parties would probably have agreed upon, if the contingency had been within their contemplation at the time of making their contract.
5. *Same. Acceptance of plan.*—Where a contract for preparing plans for a building assumes the necessity of the erection of a building following the adoption of a plan as the consummation of the act of acceptance, the preference of plaintiff's plans over others presented does not amount to such an adoption, as will charge the owner with liability under the contract.
6. *Same.*—What circumstances sufficient to repel the inference that the parties supposed the defendant intended to enter into an absolute engagement to build the proposed structure.

Appeal from a judgment of the general term of the supreme court of the city of New York, affirming a judgment in favor of plaintiff entered upon the report of a referee.

Edward W. Paige, for appellant.

Opinion of the Court, by RUGER, Ch. J.

Theron G. Strong, for respondent.

RUGER, Ch. J.—The complaint alleges as the cause of action, the performance of work, labor and services by the plaintiff as an architect in preparing plans for a proposed building for the defendant, at his request and a promise by the defendant to pay therefor what such work should be reasonably worth.

The answer sets up a special contract, under which it was alleged such work was performed, and states that the defendant and other persons were interested in the formation of a club to erect an apartment-house in the city of New York, and that the plaintiff was employed to draw plans for such proposed building under an agreement that if the club or association was organized and the building erected, the architect whose plans should be accepted would be paid by the club or association for the drawing of plans and would be employed to superintend the erection of the building, but in case the club was not formed and the plans and specifications were not adopted then the plaintiff was not to be paid.

Upon proof given on the trial the referee, among other things, found that the defendant authorized the plaintiff "to prepare and submit such plans upon the understanding or agreement between said parties, that the plaintiff should prepare and submit said plans in competition with other architects; that said apartment-house should be built either by defendant or by a club to be formed; that if plaintiff's plans were not adopted either by such club, if formed, or by defendant, if such club were not formed, plaintiff should receive no pay for his services; but if said plans were adopted by said club, if formed, or by defendant, if such club were not formed, plaintiff should be paid for such services what they were reasonably worth;" that the plaintiff submitted plans and defendant preferred such plans and adopted them in case said club should not be formed; that

Opinion of the Court, by RUGER, Ch. J.

the proposed club was never formed and the defendant finally abandoned the project of building either by himself or by a club; and, as a conclusion of law, the referee held that the plaintiff was entitled to recover what his services were reasonably worth.

The defendant duly excepted to that part of the findings of fact which stated that it was a part of the contract "that said apartment-house should be built either by the defendant or by a club to be formed," and also to so much thereof as found that defendant "adopted said plans in case said club was not formed."

A direct conflict of evidence occurred on the trial between the plaintiff and defendant, as to the terms of the contract of employment, and the referee has found in favor of the defendant's version of the transaction, but instead of giving him the benefit of such finding, has decided the law upon a cause of action not stated in the pleadings or established, as we think, by the evidence.

It is a fundamental rule that judgment shall be "*secundum allegata et probata*," and, as was said in *Day v. New Lots* (107 N. Y. 148; 11 N. Y. State Rep. 361), any departure from that rule is certain to produce surprise, confusion and injustice.

It was said by Judge EARL in *Southwick v. First Nat. Bank of Memphis* (61 How. Pr. 170), that "pleadings and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead his adversary."

It does not appear that the theory upon which this action was determined was mentioned or referred to upon the trial, and its first appearance occurs in the opinion of the referee, wherein he says, "it is true that upon this view the plaintiff recovers upon a somewhat different cause of

action from that stated in the complaint," and this is followed by the suggestion that the pleadings "may be amended, or deemed amended, to conform to the proof." This is to ignore the whole office of a pleading and compel parties to try their cases in the dark, informing them for the first time after the wrong is irremediable of the issue which they should have tried. The pleadings were not amended, and they could not lawfully be amended in a material respect except at a time which would give the party against whom the amendment is allowed a right and opportunity to meet by proof the allegations made against him. There are cases which, having proceeded in disregard of the pleadings, and wherein the whole case has been presented by both parties in their proofs without objection, in which an amendment has been allowed, after the evidence is closed, to conform the pleadings to the proofs; so, also, where the court can see that a trial has been had upon the real issue without objection, it will not disturb a recovery upon the ground that it was not embraced in the pleadings; but when the objection has been properly taken, or an exception presents the question, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings.

We do not think that the evidence warranted the finding of the referee, that the defendant agreed with the plaintiff to erect a building, either by himself or through a club. It is very certain that there is no evidence of an express agreement to that effect, and so the general term states in its opinion, although it held it might reasonably be implied from the circumstances of the case.

An elementary writer has said that "it not unfrequently happens that in the course of carrying out a contract circumstances arise which have not been contemplated by the parties and consequently where no intention has been expressed by them or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities accord-

Opinion of the Court, by **BUGER**, Ch. J.

ing to the dictates of justice, that is of equality, and according to what is presumed their intention would have been had they had those circumstances in their consideration when they made their contract." Addison on Contracts, 22.

The inquiry in such cases always is what the parties would probably have agreed upon if the contingency had been within their contemplation at the time of making their contract. Suppose the plaintiff had then said to the defendant, I am willing to rely upon your judgment and taste in the adoption or rejection of my plans and to give you credit for their payment if adopted, but your plans are all in embryo, and I do not know whether you will finally build or not; I therefore insist upon your agreeing absolutely to build. Can the court say that the defendant would have entered into such an engagement? We think not.

It does not seem to us that the circumstances surrounding this transaction bring it within the rule stated. Certainly nothing could have been farther from the contemplation of the defendant than that he should be required to pay for plans which would prove useless to him, or that he should be compelled to proceed with the erection of a structure which he had never finally concluded to build, and it is not reasonable to suppose that the plaintiff believed that the defendant absolutely contracted with him to carry out plans which he always knew were then immature and unformed. Thus the referee expressly finds that the defendant's plans were unformed and immature, and it was a natural supposition under the circumstances that they might never ripen into an absolute determination to build in the mode and manner contemplated, and yet he has found that an absolute covenant to build might nevertheless be implied against the defendant. . If this may be implied in favor of the plaintiff a similar covenant must have been made with each of the numerous architects who submitted plans for competition, and thus the defendant would be made liable for all such plans although he had made with

Opinion of the Court, by RUGER, Ch. J.

each architect an express agreement that he should not be liable therefor unless his plans were adopted.

An absolute contract to build was foreign to the object and design of the negotiations with the architects, and was entirely unnecessary to the purpose which they all had in view. They all knew that the acceptance and adoption of their plans was contingent, and that they were liable to be rejected at the mere caprice or discretion of the defendant, and it is unreasonable to suppose that they then believed that he intended to create a positive obligation on his part to build in any event. The plaintiff certainly had no such idea, for he did not allude to it in his complaint, but planted himself upon the theory of an unconditional employment by the defendant to perform the work for which he sought to recover. We think the circumstances of the case repel the inference that the parties supposed the defendant intended to enter into an absolute engagement to build the proposed structure.

We are also of the opinion that the plaintiff's plans were not accepted or adopted within the meaning of those terms as used in the contract found by the referee. They were used in connection with the idea of the employment of an architect upon a competitive trial without compensation unless his plans were adopted. It cannot be assumed that the employer intended under such circumstances to pay for the plans unless they were of value to him and were used in the construction of a building; and this view is strengthened by the further provision of the contract that in case they were adopted such architect was thereby employed to superintend the erection of the building. The contract assumes the necessity of the erection of a building following the adoption of a plan as the consummation of the act of acceptance. That the defendant preferred the plaintiff's plans over others presented to him, falls short of what is required to constitute an adoption of plans for the erection of a building. This requires a determination to build as well as an inspec-

Opinion of the Court, by BUCKE, Ch. J.

tion of plans for building. It constitutes something more than a mere mental emotion, and in order to perfect it demands a resolution to use those plans in the prosecution of work already determined upon. The learned referee had much difficulty over this point but seems finally to have concluded that the defendant's preference amounted to a qualified adoption which would charge him with liability under the contract. We do not think that this was the adoption required by the contract.

For the reasons stated, the judgments of the general term and of the referee should be reversed and a new trial ordered with costs to abide the event.

All concur, except ANDREWS, J., not voting.

INDEX.

ACCOUNT STATED.

1. *Presumptive*.—An account of sale of goods, which consists of few items, and upon which, after its receipt, payments have been made by the purchaser, is an account stated, and the law raises from such facts an implied agreement to the correctness of the account. An account thus stated is not conclusive upon either party, but is only presumptively correct, and may be impeached for any error induced by fraud or mistake. *Samson v. Freedman*, 128.

2. Accounts rendered monthly for four years, and after examination retained without objection, constitute accounts stated, and can only be opened and investigated upon proof of fraud or mistake. *Manchester Paper Co. v. Moore*, 368.

ADVERSE POSSESSION.

In an action to recover certain awards made to "unknown owners" for the taking of certain land in the city of New York, where plaintiff bases his claim to the awards on adverse possession, it is incumbent upon him to prove that the land was "usually cultivated or improved," or that it was "protected by a substantial inclosure;" and where the appellate court is satisfied that there is some evidence from which the jury can find that both of the conditions mentioned were met during a period of more than twenty years preceding the date of the awards, it will affirm a judgment founded on plaintiff's claim of adverse possession. *Paige v. Waring*, 168.

AMENDMENT.

JUDGMENT, 1.
PLEADINGS, 4.

APPEAL.

1. *Order denying new trial*.—Not reviewable. An order denying a motion for a new trial made upon the minutes of the judge, on the ground that the verdict was against the weight of evidence and excessive is, so far as it depends upon the weight of evidence, not reviewable in the court of appeals. *Bigelow v. Legg*, 32.

2. *Question of fact*.—Where all the issues involved in the merits of the controversy are the subjects of conflicting and contradictory testimony, the court of appeals is not authorized to review the determination of the jury, though this court might have arrived, upon the evidence if presented as an original question, at a different conclusion. *White v. Dominion Steamship Co.*, 41.

3. *Reversal upon the law only*.—Where the reversal of a judgment entered upon the decision of the court is upon the law only, the court of appeals does not have to deal with the weight of the evidence, but simply to determine whether there was any evidence which authorized the findings of the essential facts. *N. Y. & B. Ferry Co. v. Moore*, 52.

4. *Amount of proof*.—Courts, in weighing evidence and reaching conclusions, do not deal with possibilities, but with probabilities.

- A mistake may be made in reaching the conclusion, but mistakes cannot be eliminated from the administration of justice by human tribunals. No more certainty in proof is required than is ordinarily practicable; and the competent proof, which will ordinarily satisfy a reasonable person should satisfy a court, and justify its judgment. *Id.*
5. There is no rule of law which requires a plaintiff in a civil action, when a judgment against the defendant may establish his guilt of a crime, to prove his case with the same certainty as is required in criminal prosecutions. Nothing more is required in such cases than a just preponderance of evidence, provided the defendant is given the benefit of the presumption of innocence. *Id.*
 6. *Review of awards.*—Though, under the statute, a railway company cannot by appeal obtain a review, on the merits of a second award, yet it is within the power of a court of equity to set aside any excessive award obtained by fraud or the misconduct of the commissioners, or for any cause which will justify the setting aside of an award of arbitrators; and such relief can be obtained on motion. *Matter of N. Y., L. & W. R. R. Co.*, 79.
 7. *Same.*—An order of the general term affirming a special term order, vacating an order appointing commissioners in condemnation proceedings, is appealable to the court of appeals, as it is final and affects a substantial right. *Id.*
 8. *Undertaking.*—Where the appellant, to whom leave was granted to file an undertaking on appeal, *nunc pro tunc*, filed such undertaking and mailed notice thereof to respondent's attorney on August 7, 1885, a notice of exception to the sureties mailed on August 27 was properly served within ten days, and appellant failing to cause his sureties to justify, cannot retain his appeal. *Liddy v. Long Island City*, 147.
 9. *Decree on final accounting.* *Laches in moving to vacate.*—It is within the discretion of the surrogate to refuse to vacate a decree on final accounting entered nine years prior to the application, upon the ground of laches on the part of the petitioner in prosecuting his remedy. *Matter of Deyo*, 148.
 10. *Same. Conflicting evidence.*—The fact that the existence of the alleged mistake and error in the original accounting was determined by the surrogate against the petitioner upon conflicting evidence, is conclusive in the court of appeals against the appellant. *Id.*
 11. *Requests to find.*—In the absence of any request to find that any settlement or settlements had been made, or any reference to any fact or facts relating to either of the alleged settlements, the case is without any findings as to a settlement or settlements which raise any such question for the consideration of the court on appeal. *Eno v. Defendorf*, 157.
 12. An appeal cannot be taken to the court of appeals from an order of the general term of the supreme court, affirming a special term order, confirming a report of the commissioners of appraisement of land to be taken for the Niagara park reservation. *Matter of Commissioners, etc.*, 161.
 13. *Question of fact.*—Where the question is one solely of fact, is decided by the referee in favor of the defendant, and reviewed by the general term with the same result, that conclusion, if entirely possible and reasonable upon some views of the evidence, must prevail. *Third Nat. Bk. v. Cornes*, 167.
 14. Where the general term has affirmed a conviction of murder, the only questions cognizable in the court of appeals are those arising upon exceptions taken in the course of the proceedings. *People v. Druse*, 182.
 15. *Disputed facts.*—It is the general rule of the court of appeals to follow the conclusions of the courts below, where questions

turn upon disputed facts, unless for some very obvious and sufficient reasons. *Johnson v. Myers*, 209.

16. *Inconsistent findings.*—A finding of a referee that the claimant performed services for defendant, at his request, as a domestic in his family, is not inconsistent with a finding that her relations in his family were affectionate and kindly and like those of a daughter. *Larkin v. Maxon*, 215.

17. *NOTE ON THE EFFECT OF INCONSISTENT FINDINGS MADE BY THE COURT OR REFEREE*, 216 to 219.

18. *Surrogate. Findings.*—The court of appeals is concluded by the findings of the surrogate, where the evidence is abundant to sustain them. *Matter of Cady*, 220.

19. *Judgment absolute.*—Upon an appeal from an order of the general term reversing a judgment entered upon the report of a referee, and directing a new trial, with stipulation for judgment absolute in case of affirmance, the court of appeals will examine the whole record, for the purpose of discovering whether there are any errors committed by the trial court which will authorize an order of reversal by the general term; and if such are found, this court must affirm the order appealed from and order judgment absolute for the respondent. *Holcombe v. Munson*, 228.

20. *Reversal on law.*—Where the decision of the general term, in granting an order of reversal of a judgment entered upon the report of a referee, is placed upon questions of law alone, the court of appeals is precluded from reviewing the case upon the facts, and is confined to the examination and decision of the questions of law presented by the record. *Id.*

21. *Improper allowance. Stipulation to deduct.*—An item charged and allowed to plaintiff's intestate as a counterclaim, in a former action brought by defendant's husband against said intestate, is improperly allowed again in an action

by his administrator against defendant, and such improper allowance constitutes sufficient error to justify a reversal, unless plaintiff will consent to deduct such item and pay costs of appeal. *Alexander v. Sumner*, 274.

22. *Waiver.*—A party, who after bringing an appeal, accepts the benefit of the judgment appealed from, thereby waives his appeal, and an order of the general term, denying a motion to dismiss the appeal, to that court, will in such case be reversed. *Alexander v. Alexander*, 290.

NOTE ON WAIVER OF THE RIGHT OF APPEAL, 293 to 312.

23. *Judgment absolute.*—Where the general term order reversing a judgment entered on the report of a referee, and directing a new trial, is not erroneous, but a proper one, the court of appeals, though it may not agree with all the reasons given by the general term for its order of reversal and award of a new trial, will feel bound to affirm such order, and award judgment absolute against the plaintiffs, upon their stipulation on appeal, notwithstanding the court can see that they might have been entitled to a part of their relief. Where the error, which has justified a reversal, was merely incidental, capable of accurate correction, the court has, in one or two instances, modified the judgment by correcting the error, but these were cases in which it thought a new trial ought not to have been awarded, since there could be no recovery for what had been erroneously allowed. *Conklin v. Snider*, 275.

24. *Discretion.*—The general term may possibly have made an alternative order, permitting the plaintiffs to limit their judgment to the established relief, and on their stipulating so to do, affirming the judgment as modified; but this was matter of discretion, and to award a new trial instead, was not error. *Id.*

NOTE ON SUBDIVISION 1 OF § 191 OF THE CODE, 278 to 289.

25. *What reviewed.*—An appeal to

- the court of appeals from an affirmance, by the general term, of a surrogate's decree brings up nothing for review on behalf of a party, who has not appealed to the general term, or who has not excepted to any of the findings or decisions of the surrogate. *Matter of Kellogg*, 313.
26. *Objection first raised.*—An objection to a claim paid by an executor that it was barred by the statute of limitations at the time of payment, if not taken upon the proceeding for the judicial settlement of the executor's account, cannot be raised on appeal. *Id.*
27. *Modification.*—The general term has the right and power, under section 2587 of the Code, to modify a surrogate's decree on a judicial settlement by striking out an erroneous charge and readjusting the account, instead of sending it back for a rehearing before the surrogate. *Id.*
28. *Judgment. Interlocutory.*—A judgment entered at special term, which makes a reference necessary, is not final, but interlocutory. *Kelsey v. Sargent*, 325.
29. *Order.*—Where an appeal is taken to the general term from an interlocutory judgment, and a motion for a new trial is made at this court as authorized by section 1001 of the Code, and an order is entered affirming the judgment and denying the motion, the portion of the order which denies the new trial is reviewable on appeal to the court of appeals, but no appeal lies from the part of the order which affirms the judgment. *Id.*
30. *Motion to dismiss.*—Where an appeal in such case is taken from the whole order, a motion to dismiss the whole appeal, and not the erroneous part only, should be denied, and the respondent be required to pay costs. *Id.*
31. *Return.*—The court of appeals has no jurisdiction to compel an appellant to attach to the return copies of documents whether they are or are not part of the record of the general term; but if they are, for any reason, a part of such record, a motion for that purpose should be made in the court below. *States v. Cromwell*, 326.
32. *Order of affirmance.*—An appeal to the court of appeals cannot be taken from an order of the general term, affirming a judgment; nor is an appeal authorized from so much of the order of affirmance as affirms the order denying a new trial, where, on appeal to the general term from a judgment and from an order denying a new trial, both judgment and order are affirmed. In such case, the judgment should be first entered on such order, and an appeal taken from that judgment. *Derleth v. De Graff*, 327.
33. *Criminal law.*—The defendant, on an appeal from a conviction by a jury in a criminal case, is entitled to a review of the facts, and the exercise of the discretionary power of the general term of the supreme court. Where the general term puts its reversal in such case upon a question of law, the court of appeals will not review the order, but will remit the case to the general term to enable it to consider the questions of fact, and exercise its discretion. *People v. Stevens*, 329.
34. *By defendant. Amount in controversy.*—On an appeal by the defendant, the matter in controversy in the court of appeals is the amount of the judgment rendered at general term, and from which the appeal is taken. If this judgment, excluding costs, is not less than \$500, this court has jurisdiction to review it. Neither the limitation of the amount demanded in the complaint, nor the method by which the referee ascertained and then made up the aggregate of damages, is material. *Graville v. N. Y. C. & H. R. R. Co.*, 331.
35. *By plaintiff.*—Upon an appeal by plaintiff from a judgment in such an action, the sum for which the complaint demands judgment becomes material. *Id.*
- POINT ON "MATTER IN CONTROVERSY" AS EMPLOYED IN § 191 OF THE CODE, 332.

36. *Custody of children.*—Where the courts below, upon a view of all the existing facts relating to the welfare and interests of the infants, had exercised their discretion in awarding to the mother the custody of the children, without assigning, to an Illinois decree, awarding to her the custody, the force of an estoppel, or the conclusive effect sometimes due to a judgment, but simply regarding it as a fact or circumstance bearing upon the discretion to be exercised, without dictating or controlling it, the court of appeals dismissed the appeal. *People ex rel. Allen v. Allen*, 381.

37. *Default. Reinstatement.*—A default, which has been regularly taken in the court of appeals, will not be opened and the case reinstated, where the return, upon which the case would have to be argued, does not contain an exception worthy of a moment's consideration. *Schenck v. Bengler*, 385.

38.—The question as to the verdict being excessive cannot be reviewed in the court of appeals. *Id*

39. *Order denying new trial.*—The general terms has the power to set aside a verdict as contrary to the evidence without any exception, but the court of appeals can consider no objection which is not based upon some exception taken at the trial. An appeal to the latter court from an order denying a motion for a new trial brings up only questions of law based upon exceptions taken in the trial court. *Schwinger v. Raymond*, 396.

40. Where the possible questions of law are inextricably involved in, and dependent upon, the conclusions of fact found by the referee upon conflicting evidence, the judgment of the general term sustaining his decision will be affirmed on appeal to the court of appeals. *Bridge v. Penniman*, 444.

41. *General objection.*—A general objection to evidence is sufficient, where the grounds of the objection cannot be misunderstood, and if they had been specified, the ob-

jection cannot be obviated. *Tozer v. N. Y. C. & H. R. R. Co.*, 450.

42. *Objection not raised below.*—An objection, which could be obviated if made in time, cannot prevail when taken for the first time in an appellate court. *Wells, Fargo & Co., v. Davis* 457.

43. *Findings.*—Where there are no exceptions to the findings of fact or conclusions of law contained in the record, and none to the refusals to find requested on behalf of the appellant, the court of appeals has nothing to review but exceptions taken on the trial. *Pollock v. Morris*, 463.

44. *Findings of referee conclusive.*—Where there is any conflict in the evidence in regard to the matters in issue, the findings of a referee approved by the general term are conclusive upon the court of appeals. This is sufficient to deprive the latter court of jurisdiction to weigh the evidence. *Mooney v. Loughlin*, 465.

45. *Reversal.*—An erroneous ruling upon a question which affects the credibility of the witness only, if his evidence is wholly immaterial upon all of the material facts in issue of the case, furnishes no valid reason for reversing the judgment. *Teets v. Village of Middletown*, 472.

46. *When aggrieved.*—Where none of the appellants will be benefited by the reversal of the judgment appealed from, they are not aggrieved by the judgment, cannot appeal therefrom, and their appeal, if taken, will be dismissed. *Hyatt v. Dusenbury*, 475.

POINT ON RIGHT TO APPEAL, 476 to 483.

47. *Order of reversal.*—Where the order of reversal by the general term does not specify that the reversal was upon questions of fact, its justification must be found in some error of law revealed by the record. *Prosser v. Nat. Bk. of Buffalo*, 484.

48. *Finding of trial court.*—The

finding of the trial court does not present any error of law unless it is unsupported by any evidence, or is against the evidence. Such finding, when not disturbed by the general term, concludes the court of appeals, if there is any evidence upon which it can properly be based. *Id.*

POINT ON REVIEW IN COURT OF APPEALS UPON REVERSAL ON QUESTIONS OF FACT, 495 to 512.

49. *Time.*—A notice of an order and its entry is ineffectual to limit the time of appeal, unless it shows by indorsement or otherwise the office address or place of business of the attorney serving it. *Forstmann v. Schulting*, 521.

50. *Interlocutory judgment.*—A judgment, which finally determines certain matters in controversy between the parties but appoints a referee and directs an accounting before him, is an interlocutory judgment, from which no appeal lies to the court of appeals. *King v. Barnes*, 529.

51. *Discretionary order.*—The general term has power, in its discretion, to grant, on appeal from an order refusing it, an amendment to a complaint, which does not substantially change the plaintiff's claim, and its order allowing the amendment is not appealable to the court of appeals. *Id.*

52. *Order granting stay.*—An order reversing an order granting a stay of proceedings pending an appeal to the court of appeals, is in the discretion of the general term, and is not reviewable by the former court. *Id.*

53. *Submission.*—Where two propositions are submitted to the jury, the one properly, the other, improperly, not having any fact for its support, and the court of appeals cannot tell on which alternative of the charge the jury founded their verdict, it cannot be supported. *Black v. Brooklyn City R. R. Co.*, 580.

54. *Finding.*—The finding of the trial judge on a question of fact upon the evidence, confirmed by

the general term, concludes the court of appeals. *Varian v. Johnson*, 583.

55. *Defense not set up.*—The appellant cannot succeed, on appeal, upon a defense not set up in his answer, and not even alluded to in any way at the trial. *Id.*

56. *Criminal law.*—Where an appeal to the supreme court was taken before the amendment of 1887 to section 528 of the Code of Criminal Procedure, but the appeal to the court of appeals, after its enactment, the latter court will construe the terms of the amendment distributively, and will not deny to the prisoner the review upon the facts, which he seeks, by any nice or critical construction of the amendment. *People v. Van Brunt*, 586.

57. *Deliberation.*—The facts and circumstances of this case were held sufficient by the court of appeals to establish reflection and deliberation in the commission of the homicide. *Id.*

See JUDGMENT, 3, 4.

ARREST.

1. *Fraud.*—The evidence presented to a judge for an order of arrest under subdivision 1 of section 550 of the Code, though not as full and satisfactory as may be desired, is sufficient, if it is enough to confer jurisdiction to grant the order, on review in the court of appeals. The facts in this case were held sufficient to give the judge jurisdiction. *Fitch v. McMahon*, 239.

2. An allegation in a complaint that the defendant "wrongfully took" the chattels for which the action was brought does not necessarily imply a fraudulent taking, and the right to arrest in such case depends upon proof of the extrinsic fact of fraud. *Id.*

ASSIGNMENT FOR CREDITORS.

1. *Limited partnership.*—An assign-

ment for the benefit of creditors made by the general partners in a limited partnership, containing preferences, is void under the provisions of sections 20, 21, of 1 Revised Statutes, 766. *Schwartz v. Soutter*, 237.

2. *Subsequent assignment*.—In such case, a subsequent assignment made in compliance with section 1 of chap. 486, Laws of 1877, and without any fraudulent intent in fact, is valid, and conveys the title to the property in case no rights of the partnership creditors have intervened. *Id.*

BONDS OF INDEMNITY.

EXECUTORS, ETC., 2.

BROKERS.

1. *Waiver of demand for margin*.—Where, in an action to recover balance of loss on a transaction, the plaintiffs, who were brokers, after a written demand for more margin, and an interview with defendant, claimed that defendant consented that they might purchase and close the contract, but the defendant claimed that he refused to assent to this proposition, and that he was given time to think the matter over, and the plaintiffs, on the same day and without further communication with defendant, closed the contract, and charged the loss to the defendant, it was a question for the jury to determine which version was the true one, and, by finding in favor of the defendant, they found his version to be true; it was a fair inference from defendant's evidence that the plaintiffs waived their peremptory demand for more margin, and they had no right immediately, and without any further notice to, or any further demand upon, defendant, to close the contract. *Maginnis v. Smythe*, 23.
2. *When entitled to commissions*.—When a broker, employed to effect a sale, has found a purchaser willing to take upon the terms named, and of sufficient responsibility, he has performed his contract, and is

entitled to the commissions agreed upon. *Duclos v. Cunningham*, 67.

3. *Waiver*.—Even if ordinarily a broker is required to furnish the name of the purchaser as a condition precedent to his right to claim commissions on the sale, the vendor, if he interposes no objection on that ground, but absolutely disavows the sale, waives the right to insist upon any such condition. *Id.*

CHARGE.

TRIAL. LANDLORD AND TENANT. 2.

CHATTEL MORTGAGE.

1. *Fraud a question for the jury*.—The question whether the mortgagee gave the mortgagors permission to sell the mortgaged property, on the denial of the mortgagee, is properly submitted to the jury, under a charge that, if they found that there was an agreement or understanding that the mortgagors might sell the mortgaged property, and use the proceeds as they saw fit, it invalidated the mortgage. *M. & T. B'k v. Koch*, 415.
2. *Same*.—Even though a creditor does not know that the property of a firm is liable to be interfered with by individual creditors of a member, he has a right to demand that his firm claim be secured by a chattel mortgage, so as to have a preference over such individual creditors; and securing such a preference is not a fraud. *Id.*
3. *Notice of sales*.—The fact that the mortgagee had notice of sales by the mortgagors, and of the appropriation of the proceeds, is at the most, only evidence from which a previous agreement to permit such sales and appropriation might be inferred, and not a ground for a direction to the jury to find for the defendant. *Id.*

NOTE ON EFFECT OF CONSENT BY THE MORTGAGEE TO THE MORTGAGOR TO SELL THE MORTGAGED GOODS, 423 to 438.

CIVIL DAMAGE ACT.

1. *When case sufficient to go to jury.*

—Where the defendant testifies that he kept a liquor store during the time in question, knew plaintiff's husband to be a regular drunkard, and had seen him in his place many times and never sober, and where plaintiff testifies that she saw her husband drinking liquor repeatedly, that she repeatedly spoke to defendant, requesting him not to sell her husband liquor, but that he disregarded her requests, and that after these occasions her husband struck and otherwise abused her, and failed to render her support or contribute to it, the evidence is sufficient to require the case to be submitted to the jury, and to render their determination of the question conclusive upon the court of appeals. *O'Conner v. Conzen*, 96.

NOTE ON THE CIVIL DAMAGE ACT,
97 to 127.

CONFESSION OF JUDGMENT.

JUDGMENT 1, 2.

CONSIDERATION.

CONTRACTS, 6.

HUSBAND AND WIFE, 8.

MORTGAGES, 7.

PATENTS, 1, 2.

CONSTITUTIONAL LAW.

When judge disqualified.—A general term may review on appeal an order vacating an *ex parte* order for the examination of a person before trial upon the original and additional affidavits, even though the justice who granted the *ex parte* order is a member of such general term and acted on such review. *Phillips v. Germania B'k*, 522.

CONTRACTS.

1. *Breach.*—Under a contract for prompt shipment, the seller is compelled to use reasonable diligence, and proof that he has not

availed himself of existing facilities for complying with the contract, establishes a *prima facie* case authorizing an inference of culpable omission amounting to a breach of the contract. *Phillips v. Taylor*, 9.

2. *Same. Part delivery. Acceptance.*—The purchaser, in such case, is not in duty bound to reject part deliveries at the peril of being deemed to have given the vendor an indefinite extension of time for the performance of his contract. *Id.*

3. *Measure of damages.*—The measure of damages for breach of contract on sale of goods by the purchaser, is the differences between the market value of the goods at the time of the breach of contract, and the price at which the purchaser agreed to take them, *Biglow v. Legg*, 32.

4. *Same. Auction.*—The price obtained, after such breach, upon a resale, within a reasonable time, although at auction, is evidence of the market value of an article, and to be allowed such weight as the circumstances of the sale entitle it. *Id.*

5. *Breach. Proof of damages.*—Where parties have entered into an agreement to continue as partners for one year, and the firm is broken up and dissolved after four months by the act and fault of defendant, the courts ought not to be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits. *Dart v. Latimbeer*, 533.

6. *Consideration.*—An agreement by a husband to pay the firm debts on a purchase by his wife of her partner's interest, is made for the benefit of the vendor to relieve him from, and to indemnify him against, the firm debts without any intention to secure any benefit to the firm creditors; and as the sale is not made to the husband, and no consideration whatever passed to him, the creditors, who are strangers to the agreement, cannot enforce it against him. *Berry v. Brown*, 542.

7. *Statute of frauds*.—A promise by the husband to pay all the firm debts upon his wife's purchasing her partner's interest therein, unless in writing, is invalid under the statute of frauds, for the reason that he acquires no interest in, nor receives any benefit from, the property conveyed. *Id.*

8. *Breach by vendee*.—Where the vendee, before the time of delivery fixed by a contract of sales of goods, notifies the vendor that he will not receive or pay for them, and advises him that he had better stop at once any further attempt to carry out the contract, the vendor is justified in treating the contract as broken by the vendee at that time and entitled to bring the action immediately for the breach, without tendering the delivery of the goods, or awaiting the expiration of the period of performance fixed by the contract; nor can the vendee retract his renunciation of the contract after the vendor had acted upon it and by a sale of the goods to other parties changed his position. *Windmuller v. Pope*, 551.

9. *Damages*.—The rule of damages in an action by a vendor of goods and chattels, for a refusal by the vendee to accept and pay for them, is the difference between the contract price and the market value of the property at the time and place of delivery. *Id.*

10. *Refusal to perform*.—An absolute and total refusal, never withdrawn, to manufacture and deliver machines under a contract, and a notification to that effect to the other contracting party or his agent, is an ample excuse and justification to the latter for his omission to make further demands or serve further notices, before bringing an action for stipulated damages. *Robinson v. Frank*, 560.

11. *Waiver*.—Where, in an action on a building contract, the refusal to pay by the owner, when the demand was made by the builders upon him for payment before the commencement of the action, was not put upon the ground that any dispute should first be settled by

the architect or by the arbitrators, such defence cannot prevail. *Varian v. Johnson*, 588.

12. *Unforeseen contingencies*.—Where, in the course of carrying out a contract, circumstances arise which have not been contemplated by the parties, and consequently where no intention has been expressed by them or can be inferred from their acts, the inquiry in such cases always is, what the parties would probably have agreed upon, if the contingency had been within their contemplation at the time of making their contract. *Romeyn v. Sickles*, 594.

13. *Acceptance of plan*.—Where a contract for preparing plans for a building assumes the necessity of the erection of a building following the adoption of a plan as the consummation of the act of acceptance, the preference of plaintiff's plans over others presented does not amount to such an adoption, as will charge the owner with liability under the contract. *Id.*

14. What circumstances sufficient to repel the inference that the parties supposed the defendant intended to enter into an absolute engagement to build the proposed structure. *Id.*

See EQUITY.

HUSBAND AND WIFE, 2.
PATENTS, 1, 2.

CONVERSION.

Sale of property.—Where a firm, of which plaintiff was a member, erected a certain trestle-work for the unloading and distribution of coal, under an agreement with the defendant, but on the condition that the materials used in the construction were to remain at all times the personal property of such firm, and the defendant thereafter wrongfully took possession of the materials and trestle-work and converted them to its own use, the plaintiff, to whom his partners had conveyed their interest in the material used in the trestle-work, can, after demand, maintain an action to re-

cover the value of the same. The defendant's wrongful act in taking possession of the property did not transfer the title thereof from the firm to it, nor operate as an excuse for its failure to surrender the property when demanded. The property, by the conveyance from plaintiff's partners to himself, cease to be a partnership asset as against the defendant. *Serat v. Utica, Ithaca & Elmira R'y Co.*, 70.

CORPORATIONS.

1. *Officers.*—Where the president of a bank personally purchases shares of stock and takes, without either actual or implied authority to do so, the funds of the bank to pay therefor, he commits a breach of trust, and the bank can rely for indemnity entirely upon him and hold him as its debtor for the amount taken, or can treat him as a trustee of the stock for its use, and enforce the trust for its benefit by compelling a transfer or sale of the stock for its account, and if the bank has not claimed the stock, it cannot be held liable for the president's deceit, in the sale of such stock. *Prosser v. Nat. Bk. of Buffalo*, 484.

2. *Receiver. Real party.*—Where a corporation, in an action upon a promissory note, after proving the note and its incorporation, put in evidence an order of the court of chancery in New Jersey, in which state the plaintiff was incorporated, appointing a receiver, and a statute of New Jersey, providing for the appointment of a receiver, when any corporation shall be dissolved, the inference is that the plaintiff had no longer a corporate existence, and the complaint is properly dismissed. *Merchants' L. & T. Co. v. Clair*, 540.

COSTS.

1. *Executors. Claim against estate.*—Costs will not be awarded to a claimant, though his claim against an estate has been duly exhibited and properly presented to the ex-

ecutor before suit brought, and he is successful in obtaining a judgment, if the defense interposed has been reasonable and proper. *Johnson v. Myers*, 209.

2. *Disbursements.*—A claimant upon a reference, under the statute, of a claim against the estate of a deceased person, is entitled, if the prevailing party, to recover the necessary disbursements. The provision of the former Code allowing such disbursements was not repealed by the repealing act of 1880, but the right thereto was preserved by the qualifying section of said act. *Larkins v. Mazon*, 215.

3. The words "with costs" in an order of reversal or affirmance in the court of appeals, in a case where the allowance of costs is discretionary, mean costs in that court only. *Matter of Water Com'rs, etc.*, 351.

NOTE OF THE EFFECT OF THE ORDER OR MEMORANDUM WHEREBY THE APPELLATE COURT AWARDS COSTS ON GRANTING A NEW TRIAL, 352 to 367.

4. *Actions against municipal corporations.*—Section 3245 of the Code does not apply to actions *ex delicto*, and the notice, referred to in said section, is not required as the condition of a right to recover costs by the plaintiff in such actions. *Hunt v. City of Oswego*, 520.

CRIMINAL LAW.

APPEAL, 33, 56, 57.

DAMAGES.

1. *No proof of damages.*—Where the plaintiffs do not prove, nor offer by any competent evidence to prove, any amount of damages for an alleged trespass, there is no basis for the allowance of any substantial damages. *Murdfeldt v. N. Y., W. S. & B. Ry. Co.*, 93.

2. *Joint interest.*—The life tenant and the owners of the reversion are not jointly interested in the

damages arising from a breach of a covenant, by a railway company, to construct and maintain a passageway under its railroad. The reversioners are not entitled to any damages for breach of such covenant, during the existence of the life estate. *Id.*

3. *Future pecuniary loss.*—In an action to recover for personal injuries caused by defendant's negligence, no damages for future pecuniary loss can be awarded, unless there is some proof of the party's circumstances and condition in life, earning power, skill and capacity. *Staal v. Grand Street & N. R. R. Co.*, 516.

See CONTRACT, 3, 4, 8.

DEPOSITION.

Examination of witness under section 872 of the Code.—Where the testimony of a dying witness was taken and finished by a referee late on Saturday, night, and it was agreed by counsel that the minutes be written up by the stenographer, and subscribed by the witness, the following Monday, and it was done accordingly in the absence of both counsel, after it had been read over to the witness, and it is not claimed that any harm or prejudice came to the plaintiff from so doing, the counsel for the plaintiff waived his right to be present, and the court erred in suppressing it. *Clark v. Manhattan Ry. Co.*, 36.

DRAINAGE.

An action to restrain the defendant from digging a ditch and turning upon land water which never was there before, but naturally flowed elsewhere, will be dismissed, where, though there was an increase in the flow, it had done the plaintiff no substantial or material damages. *Jeffers v. Jeffers*, 546.

EQUITY.

Jurisdiction.—Where plaintiff, in an action to reform a contract on the ground of mistake, fails to

establish the alleged mistake, he is not entitled, in such action, to a judicial construction of the original contract. Such construction is a purely legal question to be determined in an action brought to enforce the contract. *Oakville Co. v. Double Pointed Tack Co.*, 414.

See SPECIFIC PERFORMANCE, 1, 2.

ESTOPPEL.

Statements made to a third person, and not to the defendant, nor to be communicated to him, nor intended to influence his conduct, however understood, cannot be extended beyond the party to the transaction in relation to which they were made, nor operate as an estoppel in favor of the defendant. *McGuire v. Selden*, 179.

EVIDENCE.

1. *Refreshing memory.*—The court may, in its discretion, permit a witness to refer to memoranda, proved to be correct both as to items and their values, for the purpose of refreshing his memory, where the items of an account or claim are numerous, and therefore difficult to be retained in the memory. *Wise v. Phenix Fire Ins. Co.*, 7.
2. *Explanation.*—In an action brought to recover, for the contract price of 56 bales of Leghorn rags, sold and delivered by plaintiff to defendant, where an agreement to sell and deliver 450 bales of rags, and a breach of such contract, are set up as a counterclaim, proof, on the part of the defendant, of a resale of the goods to other parties, and of their refusal to accept after a specified date by reason of the delay, caused by plaintiff's failure to fulfill, is competent for the sole purpose of explaining facts brought out by the plaintiff to establish a waiver as to time of performance. *Phillips v. Taylor*, 9.

3. *Varied written contract.*—A written contract, which is clear and

unambiguous, and contains neither direct nor latent ambiguity, embodies the agreement and speaks the language of the parties, and parol evidence is inadmissible to add to or take from the language used, and to give any other meaning to the contract than its language imports. *Long v. Miller-ton Iron Co.*, 27.

4. *Sales note*.—An offer by defendant's counsel to show that a sales note, introduced by plaintiff's counsel without objection, was a mere memorandum, which, according to the custom of brokers and dealers in wool, amounted to a proposition which might be rejected or accepted by either side, and which, until rejected or accepted by both, was left open, is properly refused. The terms of the note are of no importance, unless the persons signing it were in fact the brokers or agents of the party for whom they profess to act, nor unless the contract, expressed by these terms, was one which they were authorized to make; and even in such case, no usage can control the rule of law applicable to its construction. *Bigelow v. Legg*, 32.

5. *Objection must be made promptly*.—Where counsel, on cross-examination, observes that the witness is not answering a question by "yes or no" when so directed, but is proceeding to give an answer which has once been stricken out, he should stop the witness and arrest the answer. He cannot lie by and speculate on the chances of first hearing what the witness will testify, and, if the testimony proves unsatisfactory, then move to strike it out. In such case, the matter generally rests in the discretion of the court, and is not reviewable. *People v. Chacon*, 33.

6. *Unimportant evidence*.—The refusal of the court to strike out evidence, in a criminal action, which could not have influenced the verdict, furnishes no reason for a reversal of the conviction. *Id.*

7. *Offer*.—An offer to prove a fact, already sworn to and admitted in

the case, is immaterial, and properly excluded. *White v. Loomis Steamship Co.*, 41.

8. *Compromise*.—The admission of a distinct fact, which in itself tends to establish a cause of action or defense, is not rendered inadmissible from the circumstance that it was made during discussion relating to a compromise, unless it is expressly stated to be made without prejudice; but, if the admission is of such a nature that the court can see that it would not have been made, except to accomplish the results of the negotiation, and under an agreement, which can be fairly implied from the circumstances, that it is not to be used afterwards to the prejudice of the party making it, is not error for the court to exclude the evidence. *Id.*

POINT ON ADMISSIONS MADE DURING AN ATTEMPTED COMPROMISE, 47 to 51.

9. *Error cured*.—An error in the rejection of competent evidence is cured, if the excluded fact is afterwards fully proved, or an opportunity given to the injured party to secure an answer from the witness to the very inquiry which had been previously excluded. *People v. Clark*, 162.

10. *Same*.—Such error is also cured by the proof of the facts sought by the testimony of another witness, and giving the party the full benefit of all possible inferences to which they lead. *Id.*

11. On the trial of an indictment for murder, the defendant, in support of his claim that the homicide was committed in self-defense, can not be permitted to show that the deceased treated his domestic animals with cruelty. He may, after giving evidence tending to prove self-defense, follow it by proof of the general reputation of the deceased for quarrelsomeness and violence; but he is confined to proof of general reputation, and evidence of specific acts of violence toward third persons is inadmissible. *People v. Druse*, 182.

12. *Confession*.—The confession of

- a defendant, not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution, is voluntary though made when under arrest, and is admissible against him on a criminal trial, within the general rule prescribed by section 395, of the Code of Criminal Procedure. *Id.*
13. Evidence to show that the deceased robbed his father, when in his coffin, of his grave clothes, and wore them at his funeral, is wholly irrelevant and immaterial, on the trial of an indictment for murder. *Id.*
14. *Opinion.*—In an action for services rendered, a question asked of a witness who has some knowledge of the fact, as to what proportion of plaintiff's intestate's time was devoted to defendant's testator's business, calls for a fact within the witness' knowledge, and not for an opinion. *Johnson v. Myers*, 203.
15. *Value of services.*—The character and ability of a person have much to do with the value of his services, where the duty to be done requires the best of judgment, a skill and ability beyond the average, is largely of a confidential character, and has no common and general market value; and the person chosen to perform it has a right to be paid upon the standard of the capacity which enters into the work and forms the principal and essential value of the services. *Id.*
16. *General objection.*—Where an objection cannot be obviated by any means within the power of the party offering the evidence, a general objection thereto is sufficient to raise the question of its admissibility. *Holcombe v. Munson*, 223.
17. *Parol evidence.*—A written contract cannot be explained, modified or contradicted, either as to its express or implied terms, by parol evidence, whether the proposed parol modification purports to have been made before, at the time of, or after the date of the execution of the instrument; certainly not, where the contract proposed to be proved is required by the statute of frauds to be in writing. *Id.*
18. *Opinion.*—The opinion of witnesses, who have no knowledge of the location and dimension of a lot of land, other than the statements of a third person, who pointed out a lot to them, as to the number of acres therein, and the number of cords of wood it would produce per acre, unless supplemented by the testimony of the informant that he knew the lot and pointed it out to the witnesses accurately, is merely hearsay evidence and incompetent, and the denial of a motion to strike out the testimony is error. *Id.*
20. *General objection.*—Where a question and an answer cover both facts that are competent and material, and those that are incompetent and immaterial, both are improper. A question must be wholly competent and material, or it must be excluded. When a party assumes to prove in bulk a large group of facts, he must be sure that they are all competent; and it is no answer to an objection made to such a question that some of the facts are competent. Nor is it the duty of the defendant, especially in the absence of any request by the court or the opposing counsel, to grope through the great mass of facts, and point out such as are particularly objectionable. Where the evidence as a whole is in its very nature essentially objectionable, a general objection is sufficient. *Hinman v. Hare*, 241.
21. *When immaterial.*—Evidence that the prosecutor appointed by the defendant, on the trial instituted in the ecclesiastical court, who from his being a communicant of the church must be assumed to be canonically qualified to act in such capacity, was, while in state of gross intoxication kept over night by defendant, and remained in his company the next day, and was thereafter continued by him as prosecutor in said proceeding, is wholly immaterial, and its sole effect is to disparage and defame the defendant and prejudice him in the minds of the jury. *Id.*

22. *Incompetent*.—Where nothing had been said about a certain loan in either of the pamphlets issued by the parties, and there was no allegation about it in the pleadings, but a witness whose deposition had been taken *de bene esse*, spoke incidentally, as a reason for his remembrance of another fact, that he was so much shocked about "this loan of \$500," testimony that said amount had been previously paid, is incompetent, not within the issue, probably harmful to defendant and should not have been received. *Id.*
23. *Impeachment of person not a witness*.—The allowance of evidence as to the bad reputation, for truth and veracity, of a person in the community where she resided, upon whose statements defendant had based certain charges against plaintiff, was erroneous, on the ground that defendant should not have been deprived of the benefit of the information thus received upon which he in part relied and acted, by such a general impeachment of the character of the person, not a witness, from whom the information emanated. *Id.*
24. *Opinion*.—Where the sole issue was whether the defendant had knowledge of the rumors affecting plaintiff's character for purity, and had received such information that he could, in good faith, and without actual malice, print the pamphlet in which it was charged that the plaintiff's reputation was infamous in the Indian Country, and that he was impure and unchaste with Indian women, the opinion of a witness that plaintiff was innocent of previous immoralities which the witness had long before investigated, was not competent, and was well calculated to prejudice the case of the defendant. *Id.*
25. *Explanation*.—The defendant, in an action for libel, is entitled to show the circumstances which provoked a disparaging remark made by him concerning plaintiff, and under which it was made, and that the remark was not made maliciously, but while burning with indignation, and shocked by what he had just heard in reference to the conduct of plaintiff. *Id.*
26. *Refute malice*.—Where defendant, in his pamphlet upon certain portions of which the action for libel was founded, has made statements affecting plaintiff's conduct in pecuniary matters, and plaintiff has been allowed to testify that they are false, it is competent for defendant, upon the issue of good faith and malice, to show upon what evidence his statements were based. *Id.*
27. *Section 829*.—In an action brought by a trustee against the executor of his co-trustee to have lands standing in the name of said deceased trustee declared part of the trust estate, the surviving husband of a deceased sister of said deceased trustee, who was not personally interested in the trust estate, but whose children were interested, was a competent witness concerning conversations had with the deceased. *Conklin v. Snider*, 275.
28. *Section 829*.—The testimony of an executor, on his judicial settlement, as to a payment made by him to the testator, in order to obtain a credit for the amount, relates to a personal transaction with the testator, and is properly excluded under the provisions of section 829 of the Code. *Matter of Kellogg*, 318.
29. *Ambiguous terms*.—The words "ruling market rates" used in a written contract, where there were two market rates, one for the goods as bought of importers, and another for same goods as sold by jobbers, may be explained by the conversations of the parties, the surrounding circumstances, the characteristics of the business conducted by each, and their relative needs and modes of action. *Manchester Paper Co. v. Moore*, 368.
30. *Ultior consequences*.—In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, testimony as to the ultior consequences, which may

ensue or be apprehended from the injuries received by the plaintiff, is inadmissible, unless there is such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. *Tozer v. N. Y. C. & H. R. R. Co.*, 371.

81. *Hearsay*.—A conclusion reached by a judicial officer upon *ex parte* affidavits, to the effect that they contained sufficient evidence to prove an indebtedness from one party to another and the perpetration of frauds by the debtor in incurring it, is not competent evidence, in an action between third parties, to establish either the fact of such debt or of such frauds. Such proof is mere hearsay. *Bookman v. Stegman*, 377.

82. *Best possible*.—Where in an action upon a policy of insurance on a stock of goods, the pass books, bills of purchase of goods, and other books save the inventory book which contained an inventory taken by plaintiff's vendors ten months before the fire, were destroyed by said fire, the plaintiffs were allowed nine years afterwards, in order to prove the value of goods burnt, to introduce in evidence the above mentioned inventory which they assisted in making, and also the footings of an inventory, made by themselves a few days before the fire, entered in pass-books and transferred to said inventory book, which footings were authenticated by the testimony of both of the plaintiffs as correct footings of the inventory contained in the pass-books, and as representing the cost of the goods; and the court of appeals held that the rules of evidence were not violated. *Ellsworth v. Aetna Ins. Co.*, 382.

83. *Expert*.—Whether barrels upon the deck of a canal boat were properly covered by the captain so as to protect them from rain, is not properly a subject of expert evidence. From the facts proved, the jury can determine whether the covering was sufficient. *Schwinger v. Raymond*, 395.

84. *Intent*.—Though a party may be

examined as to his own intentions and motives when a question of fraudulent intent on his part is in issue, he cannot be permitted to testify as to the motives or intent of another party. *M. & T. B'k v. Koch*, 415.

85. *Re-direct examination*.—The court may, in its discretion, refuse to allow a witness, on re-direct examination, to be further examined as to matter called out on the direct, but not referred to in the cross-examination. *Id.*

86. *Exclusion*.—A question, calling for an inference or opinion of the witness, founded upon facts either undisclosed or insufficient to warrant the conclusion sought, is properly excluded. *Pollock v. Morris*, 463.

87. *Secondary*.—There is no fatal error in the admission of a copy of a letter, though no sufficient ground was laid for the admission of secondary evidence of its contents, where it is perfectly plain that no harm could have resulted from its admission. *Dart v. Laimbeer*, 538.

88. *Secondary*.—In order to show that the plaintiff was not the owner of the claim sued on, parol evidence that whatever property the members of her order had on joining the society, then belonged, under written regulations, to the society, was secondary, and, under objection, properly excluded. *White v. Price*, 592.

See CONTRACTS 14.
NEGLIGENCE 10.

EXECUTORS, ADMINISTRATORS, ETC.

1. *Refusal of letters*.—Where a person, who has been appointed an executor, has been, for several years prior, in the habit of using intoxicating liquors, occasionally becoming intoxicated thereby, and latterly such use had become much more frequent than formerly, so that a greater part of the time he was under the decided in

fluence of intoxicating liquors, sometimes indulging in protracted sprees and ending in delirium tremens; and though in the year 1879 was worth \$20,000, had become insolvent and unable to pay his debts, his improvidence was such that the surrogate might properly adjudge that he was incompetent to execute the duties of the trust conferred upon him by the will and refuse to grant him letters testamentary as such executor. *Matter of Cady*, 220.

2. *Admissions of claim*.—An executor, in admitting a claim against the estate, acts for and represents all the persons interested in the estate, and his admission alone, in the absence of countervailing evidence, fraud or collusion, is sufficient to authorize the surrogate to find that the claim had not been paid and has been kept in life by payments made thereon. *Matter of Kellogg*, 313.

8. *Bond of indemnity*.—A bond of indemnity given by an administrator to the sureties on his bond, and conditioned to save them "from any loss or error which might arise from or be caused by said administration" does not cover expenses incurred by the sureties in an effort to be discharged therefrom, or in their effort to compel the administrator to account. *Boyle v. McCahill*, 473.

GIFT.

When fraudulent.—A gift by a testator some five years before his death when his assets far exceeded in value the amount of his debts, in the absence of an actual intent to defraud, is not a fraud upon his creditors, though he died insolvent. *Matter of Kellogg*, 313.

HUSBAND AND WIFE.

1. *Proof of marriage*.—Where a union between the parties is at first illegal, followed by no formal celebration of marriage, without evidence of any present agreement to take each other for husband and wife, or at least with

doubtful proof of any change of relations, the finding of the trial judge thereon that no contract of marriage was ever entered into between them, has evidence in its support which raises a conflict, and precludes the court of appeals from reviewing the weight of the testimony. *Harbeck v. Harbeck*, 74.

2. *Agreement*.—An agreement between husband and wife, during a separation and pending an action for limited divorce, that his property should be sold and, after deducting his debts, one third of the remainder paid to her and they were to live apart, is valid, and an action is maintainable to recover the portion of the proceeds agreed to be paid to her. *Pettit v. Pettit*, 555.

3. *Consideration*.—Where the separation between husband and wife exists as a fact and is not produced or occasioned by the contract, the consideration of the husband's agreement to pay is his release from liability for the support of his wife. *Id.*

See JUDGMENT, 6.

INJUNCTION.

DAMAGES, 1.

INTERLOCUTORY JUDGMENT.

APPEAL, 28, 50.

INTEREST.

JUDGMENT, 5.

JUDGMENT.

1. *Amendment*.—The plaintiff has no legal right to demand from the court permission to amend the statement of the confession of judgment, but such amendment is one which the court may in its discretion refuse, or grant upon such terms as to it may seem to be just. *Symesen v. Selhetmer*, 455.
2. *Terms*.—The special term, on

granting such motion, may not annex to the amendment a provision which absolutely postpones the lien of the judgment, but may impose such postponement as a condition of granting the motion, giving the plaintiff the option of accepting the favor upon the condition imposed, or of not taking it and leaving his judgment in its original state. *Id.*

8. *Power of court of appeals.*—The court of appeals, in such case has no power to amend its remittitur by putting in some other condition than that imposed by the supreme court. To do so would be an exercise of the former court's, and a review of the latter court's, discretion. *Id.*

4. *Effect or order.*—The order as modified, if plaintiff accepts the conditions, cannot, it seems, be construed to postpone plaintiff's judgment to the lien of a judgment docketed in form, but which is, as matter of law, void. *Id.*

5. *Interest.*—In an action brought in this state upon a judgment obtained in another state, the interest allowed is that of the *lex fori*; and a provision in the judgment sued on, allowing interest at the rate of ten per cent, does not control. *Wells, Fargo & Co. v. Davis*, 457.

6. *Foreign. Divorce.*—A foreign judgment against one who, at the time it was rendered, was domiciled in this state, was not served with process, did not appear in the action, and had no actual notice of its existence until a copy of the final decree was served upon her, is void. *Cross v. Cross*, 572.

7. *Recitals.*—Recitals in such a judgment that the plaintiff therein was a resident of the state in which the judgment was rendered, are not conclusive; and it is competent to attack the jurisdiction of the court, and question the truth of the foreign residence. *Id.*

JURISDICTION.

Superior Court.—The provision of

section 608 of chap. 410 of Laws of 1882, that when no ownership is named in the report of the commissioners, or the owners named cannot be found, it shall be lawful for the city to pay the award into the said supreme court, to be disposed of by it, is for the city's benefit, which it may adopt and plead as a defense, but to which it is not compelled to resort. The city may not adopt such a course, but may bring the money into the court, in which it is sued, and the superior court of the city of New York in such case has jurisdiction. *Pollock v. Morris*, 463.

JURY.

Competency.—A juror who has an impression as to the guilt or innocence of the prisoner, if he testifies that he will be governed by the evidence, and his previous impression will not influence his verdict, and that it is his belief that he can render an impartial verdict according to the evidence, and that he will give the prisoner the benefit of every reasonable doubt, and acquit him, if such doubt exists, is competent within the established rule. *People v. Clark*, 162.

LANDLORD AND TENANT.

Keep in repair. Where a new roof was put on the premises the year before, and there is no proof that it had leaked or manifested defects up to the date of the tenancy, the covenant in the lease to put and keep in repair, does not necessarily imply that the roof was out of repair to the knowledge of the landlord; the defects occurring must be brought to his notice by the tenant. *Thomas v. Kingsland*, 562.

2. *Charge.*—A request to charge "that, if the jury find that the plaintiff once notified the defendants that the roof was out of repair and leaking, it was their duty to put it in good repair and keep it in that condition during the entire time of the lease thereafter with-

out further notice," concedes the necessity of notice to make it the landlord's duty to put the roof in repair, and is inconsistent with the claim that no notice was required. *Id.*

LIMITATIONS, STATUTE OF.

1. An answer which sets up that the defendant has settled and paid plaintiff for all deal, accounts, matters and things he has ever had with plaintiff, and denies that he is indebted to her in any sum whatever, and that more than six years have elapsed since the matter and things mentioned in plaintiff's complaint, or any of them, have become due, contains merely a defense of payment, and is not a sufficient plea that the claims and demands of the plaintiff are barred by the statute of limitations. *Eno v. Diefendorf*, 157.
2. Where mutual accounts exist between the parties, and some of the items accrued within six years before the commencement of the action, the statute of limitation has not run against any of them. *Id.*
3. Payments made at different times upon the account, if any is made within six years before the commencement of the action, prevents the statute from running. *Id.*
4. The statute of limitations, as against the trustee of an actual, express, subsisting trust, does not begin to run against the beneficiary, until the trustee has openly, to the knowledge of the beneficiary, renounced, disclaimed, or repudiated the trust. *Lammer v. Stoddard*, 211.
5. In case of a trustee *ex maleficio* or by implication or construction of law, the statute begins to run from the time the wrong was committed by which the party became chargeable as trustee by implication. *Id.*
6. *Indorsements.* — Indorsements made while a note is in life, and when against the interest of the holder to make them unless true,

are *prima facie* evidence of payments, even though made after the lapse of six years from the date and maturity of the note. *Matter of Kellog*, 313.

7. *Payment.* — A payment obtained from the debtor through a pressure of an examination in proceedings supplementary to execution and an order of the court, does not stop the running of the statute of limitation, or revive the claim. The efficacy of a payment to avert the effect of the statute as a bar resides in the conscious and voluntary act of the debtor, explainable only as a recognition and confession of the existing liability. *Blair v. Lynch*, 439.

MASTER AND SERVANT.

1. *Negligence.* — A foreman of the rollers in a rolling mill, who is a skilled workman, accustomed to the machinery and the service, and has the capacity and ability fully to appreciate the consequences of leaving the couplings uncovered, where the fact is entirely obvious and the resultant peril plain at a glance, assumes the risk of injury from the observed and obvious omission. *Shaw v. Sheldon*, 191.
2. *Same.* — The fact that the superintendent asked the deceased if he wanted the couplings covered, and that the latter declined the precaution, conclusively proved that the servant took upon himself the risks of the omission and freed the employer from responsibility. *Id.*
3. *Question of fact.* — Where, in an action to recover damages for injuries alleged to have been sustained by plaintiff through defendant's negligence, the evidence admits of different and discordant inferences as to whether or not plaintiff was defendant's servant, and as to whether or not a person whom plaintiff claimed hired him was an independent contractor, or an employee of defendant, they are both questions of fact, and should, under proper directions, be submitted to the jury. *Brophy v. Bartlett*, 575.

MORTGAGE.

1. *Consideration.*—A mortgage executed by a wife upon her own real property, and delivered by her to her husband, who used it as collateral security to procure an extension of time on certain notes given by his firm, is based upon a sufficient consideration, and is valid, in the absence of proof that the mortgage was diverted from the purpose for which it was intended. *Maclaren v. Percival*, 65.
2. *Extension. Costs.*—The payment of nearly all the interest due on a mortgage, with an offer to get the small balance due and permission to the mortgagor to take his time, does not operate as an extension of time, nor as a waiver or estoppel which precludes the mortgagee from bringing an action to foreclose the mortgage on default, under the thirty day clause, occasioned by the non-payment of such balance; but the court can exercise its discretion as to dismissing the complaint and awarding costs. *House v. Eisenlord*, 78.
3. *Foreclosure.*—The plaintiff, who purchased at a foreclosure sale under an arrangement that the sale was to take place in due and lawful form, and to be an effective and real sale, and that if she, or any one for her, became purchaser, she should go into possession as such; but that at any time within one year after taking title, she should reconvey to the defendant upon being paid the mortgage debt and interest and subsequent expenditures, is entitled to a deed from the referee, and is not liable to account as a mortgagee in possession; and an order requiring the delivery of the referee's deed, and denying the motion for an account, is properly granted. *Belter v. Lyon*, 151.
4. *Foreclosure. Part of premises in another state.*—The supreme court of this state has jurisdiction, in an action to foreclose a mortgage, to decree a sale of the whole of the mortgaged premises, though a portion thereof lies in another state. The court may order the mortgagor, if subject to its jurisdiction, to execute a conveyance in aid of a sale under the decree. Such order, though not originally demanded, can be granted by way of amendment, even after the report of sale. *Union Trust Co. v. Olmstead*, 153.
5. *Payment.*—Where a bond and mortgage were given forty-eight years before the mortgagor's death, and thirty-four years before the mortgagee's death, and during most of this time the former had possessed ample pecuniary ability to pay, while the latter did not have much means, nor have the bond and mortgage in her possession at the time of her death, though the mortgage was found, after the death of both parties, to be uncanceled of record, the non-production of the bond and mortgage was held to furnish very satisfactory and conclusive evidence of their payment. *Lammer v. Stoddard*, 211.
6. *Taxes.*—Where a mortgage requires the mortgagor to pay all taxes and assessments, and upon his default empowered the mortgagee to pay the same "with any expense attending," and made the amount so paid a lien upon the premises; and where, in an action to foreclose the mortgage, the mortgagee employed a searcher to examine and determine what were legal taxes and assessments, and see that proper deductions were made for the illegal charges, agreeing to give him a certain proportion of the amount he succeeded in having deducted, and paid the legal liens and the percentage so agreed upon, the latter is a proper item of expense, and became on payment a lien upon the premises; and a tender not including the amount of this item was insufficient. *Equitable Life Ass'n v. Von Glahn*, 524.
7. *Want of consideration. Evidence.*—The defense of want of consideration is equally available, in favor of a grantee of the mortgagor who paid full value, against the assignee of a mortgage as against the mortgagee, though a bona fide purchaser; and evidence on the part of the grantee to prove

that the mortgage was given for the purpose of defrauding the mortgagor's creditors, and upon no other consideration, is admissible. *Briggs v. Langford*, 558.

MUNICIPAL CORPORATIONS.

1. The restrictions contained in the charter of the village of Saratoga Springs (section 61 of chap. 220, Laws of 1866), against the expenditure of money and the creation of a village debt, were repealed, as to the water commissioners of the village, by chap. 557, Laws of 1868, and chap. 763, Laws of 1872. *Mingay v. Hanson*, 132.
2. Every change in the natural surface or condition of land, made in the improvement of a street, which to any extent increases the flow of surface water on adjacent premises, does not constitute an actionable injury, and render the municipal corporation liable therefor; but a substantial change in the direction or volume of the surface water, unfavorable to the adjoining owner, must be shown to have resulted from the acts of the corporation. *Rutherford v. Village of Holley*, 387.
3. *Obstruction*.—Where earth is deposited upon a sidewalk by an adjoining owner, where there is abundant room upon his land for its deposit, *prima facie* its deposit upon the sidewalk is unauthorized and therefore wrongful. *Shook v. City of Cohoes*, 577.
4. *Same*.—Where defendant's superintendent has actual notice of such wrongful deposit, it becomes its duty at once to arrest further deposit, and remove what had been placed there. *Id.*

NEGLIGENCE.

1. *Stopping at station*.—A passenger upon a train is bound to act upon appearances; and, if the train, after the brakeman announces a station, is run so slowly as to appear to a person of ordinary intelligence and observation to have stopped, ordinary

care for the safety of the passengers requires the train to be so run and managed as not to endanger their lives; and a sudden jerk or start, without warning, when the passengers are upon their feet moving toward the platform of the cars, is sufficient evidence of carelessness to impose liability upon the company; and a charge in such case that, if the train appeared to have stopped, then for all practical purposes and for the consideration of this case, it had stopped, is not erroneous. *Bartholomew v. N. Y. C. & H. R. R. Co.*, 72.

2. *Nonsuit*.—Where, in an action to recover damages for the negligent setting fire to and burning plaintiff's barn by coal escaping from the smoke-stack of a locomotive passing on defendant's road adjoining plaintiff's premises, defendant insisted that the fire was caused by either of two engines passing on its road, both of which were claimed to be in perfect order, but it was shown that it might have been caused by another engine having a hole cut in its fire screen and not in good order, it is a question of fact for the jury to determine which engine caused the fire, and a nonsuit is properly refused. *Seely v. N. Y. C. & H. R. R. Co.*, 76.
3. *Questions for the jury*.—A railway company has a perfect right to lay down its track across a highway, but is bound to exercise proper care and skill in the performance of the work and to restore the highway, as far as practicable, to its former condition, so as to render it safe and not impair its usefulness; and while it is engaged in this work, it is also its duty to prevent any obstruction to persons passing, so far as that can be done. It is liable for negligence in this respect, in case the plaintiff's negligence does not contribute to the result; and defendant's negligence and plaintiff's contributory negligence are questions for the consideration of the jury. *Rembe v. N. Y., O. & W. R'y Co.*, 154.
4. *Same*.—In an action to recover damages for personal injuries suf-

ferred from driving over defendant's track at a point where it was constructing its track across the highway, the question whether plaintiff erred in his judgment, or could in any way have avoided the accident by any greater degree of care than he exercised, is one for the jury to determine; and their finding upon the questions of negligence and contributory negligence, is conclusive upon the court of appeals. *Id.*

5. *Highway crossing*.—Though a railway fails in its duty to restore the highway, across which its track is constructed, to such a state as not unnecessarily to have impaired its usefulness, or to make the passage to its bridge safe for the public, it is not liable, unless the injured party is shown to have been affected by its negligence, or his injuries are caused by some default on its part. The proof, and not the mere surmise of the jury, must establish that he was at the wing wall going towards, or was on, the bridge when the accident occurred, otherwise the condition of the bridge over the highway becomes unimportant. *Gardiner v. N. Y. C. & H. R. R. Co.*, 195.

6. *Contributory*.—Where, in an action to recover damages against an elevated railway company for alleged negligence in causing the death of plaintiff's testator, the plaintiff's proof shows that, after the gate was closed and the train in motion, the testator had hold of the stanchions of the platform, clinging to them as the train moved while the gateman was pushing him away, a motion for a nonsuit should have been granted. *Card v. Manhattan R'y Co.*, 199.

7. *Contributory*.—Though the bell is not rung or the whistle sounded, it is still the duty of a traveler on the street crossed by the railroad to exercise due care and diligence to discover whether a train is about to pass, and if he fails to do so, or if, seeing the approaching train, he nevertheless undertakes to cross, he is guilty of negligence, and, in either case, if injured, so contributes to the accident that he can have no just cause of ac-

tion. To determine whether a complaining party is within this rule of exclusion, or whether his conduct in a given case is consistent with reasonable and ordinary care, is in view of all the circumstances surrounding the transaction, usually a question for the jury; and only in exceptional cases, when no facts are in dispute, nor any weighing of testimony necessary, can the court answer it. *Sherry v. N. Y. C. & H. R. R. Co.*, 319.

8. *Street crossing*.—In an action for an injury caused by the alleged negligence of a railway company, which ran trains drawn by a dummy engine through the streets of a city, the stopping of its cars so as to wholly obstruct the street and prevent the plaintiff thereby from seeing a train coming behind such cars, until the same was actually upon her, was a fact proper to be submitted to the jury upon the question whether the defendant was guilty of negligence in the running or management of its trains. *Cumming v. Brooklyn City R. R. Co.*, 345.

9. *Mother of child*.—Where, in an action to recover damages for injuries sustained by a child of tender years, who was struck by a train when passing along a public street where it was crossed by a railroad track, she was not guilty of any negligence, but acted in all she did with ordinary care, it was entirely immaterial that her mother was guilty of negligence in permitting her to be at large; and the admission of incompetent evidence to excuse such negligence on the mother's part was not ground for reversal. *Id.*

10. *Evidence*.—It seems that evidence that the mother was unable to hire any servant or person to aid her in looking after the child, is not competent to rebut proof of negligence on her part, even were such claim of imputed negligence material. *Id.*

11. *Right of way*.—A street railway has not the exclusive, but simply the paramount, right to the use of its tracks; and though a person, lawfully driving upon the same

tracks, must not recklessly, carelessly or willfully obstruct the passage of its cars, he is not absolutely bound to keep off, or get off, from the tracks; if he fairly and in a reasonable manner respects the paramount right of the company, and, without any fault on his part, is injured by carelessness or fault chargeable to the railway, the law affords him a remedy by action for damages. *Fleckenstein v. Dry Dock R. R. Co.*, 447.

12. *Parcels in rack*.—A railroad company, in looking out for dangers arising from the placing of packages in the car-rack by passengers, is not to be held to the exercise of the highest care which human vigilance can give; reasonable care, to be measured by the circumstances surrounding each case is all that is demanded. *Morris v. N. Y. C. & H. R. R. Co.*, 513.

13. Where there is nothing extraordinary about the parcel or its position in the rack, and nothing to attract particular attention to it, the failure of the train hands to notice it, or, if noticed, to order its removal, is not negligence. *Id.*

14. *Jury*.—Where, in an action to recover for certain goods left in a car standing adjoining a freight house, the danger was palpable, and the company had reason to apprehend that the freight house might take fire at any time from a passing locomotive, the question whether the company exercised proper care and reasonable prudence in leaving the car exposed to the hazard of fire communicated from the freight house, is for the jury to determine. *Tanner v. N. Y. C. & H. R. R. Co.*, 569.

15. The company is bound to protect the goods from unreasonable hazard from extrinsic dangers; and it is for the jury to say whether in any given case, this obligation is discharged. *Id.*

16. *Questions for jury*.—In an action to recover damages for personal injuries caused by falling upon a sidewalk in one of defendant's streets, upon which a quantity of earth had been de-

posited, the trial court cannot, as a matter of law, properly rule that plaintiff was guilty of culpable imprudence in attempting to pass over the obstructions upon the sidewalk, though they were known to her. *Shook v. City of Cohoes*, 577.

17. Whether upon the whole evidence the obstruction had existed for such a length of time that the defendant was guilty of negligence and in fault for not taking notice of it and removing it, was also a question for the jury. *Id.*

18. *Question for jury*.—A proposition, depending upon conflicting evidence, is a question of a fact, and, when properly submitted to the jury, the court of appeals is bound by their opinion. *Black v. Brooklyn City R. R. Co.*, 580.

19. *Duty of company*.—It is the duty of a street railroad company, in the exercise of its franchise, to offer the intending passengers a reasonable opportunity safely to board its cars. *Id.*

See MASTER AND SERVANT, 1, 2.

NONSUIT.

TRIAL, 6.

PARTIES.

A nun, who, on uniting with a society, assents to a regulation that property of the members belongs to the society, does not thereby, it seems, make any transfer effectual even between the parties, and may subsequently bring an action upon an existing claim. *White v. Price*, 592.

See PLEADINGS, 3.

PARTNERSHIP.

1. *Liability*.—In order to hold defendants as partners with a corporation to which goods had been sold, where they were not such *inter sese*, it is necessary for the plaintiff to show that defendants held themselves out as copartners

with the corporation and that the corporation obtained credit on that account. *McLewee v. Hall*, 171.

2. *Same*.—The court of appeals has decided, in *Cassidy v. Hall*, 97 N. Y. 159, that the written agreement between the defendants and the corporation which forms the basis of this action does not make them copartners, or liable as such; and in this case holds that upon the question of partnership no substantial ground of difference exists between that and the present case. *Id*.

3. *Same pleadings*.—Where the complaint sets up a cause of action against the defendants either as copartners *inter sese*, or as holding themselves out as such, the admission in evidence of a promise, original or collateral, by the defendants to pay for the goods sold and delivered to the corporation, against their objection, is error, and, without an amendment of the complaint, proof of the defendants' liability, founded upon a basis other than that stated in the pleadings, cannot be given and acted upon to sustain the unpleaded cause of action. *Id*.

PATENTS.

1. *Consideration*.—A party manufacturing under a license cannot escape the payment of royalties by alleging the invalidity of the patent, so long as it has not been legally annulled. *Hyatt v. Dale File Mfg. Co.*, 469.

2. The withdrawal of a notice of forfeiture of the agreement between the parties, under a clause therein at the request and upon the promise of the licensee to pay the royalties due, is a good and sufficient consideration for the licensee's promise, and such as will enable the patentee to maintain an action therefor. *Id*.

PAYMENT.

Where an attorney, who had made a collection for the testator and was

directed to pay the amount to his agent, who afterwards became his executor, deposited the proceeds in the bank in his own name, and sent his check to such agent payable to him, which was received prior to, but on the same day that testator died, and the money drawn thereon two days later and credited in his account with the testator, the delivery of the check at the agent's office to some one in charge there, was a delivery to him and operated as a payment *sub modo*; and, when the money was drawn upon the check, the payment related back to the delivery of the check; and he did not draw the money as executor but as payee of the check, and could not, in law or equity, be compelled to account for the check except by first applying it upon what the testator owed him in current account. *Matter of Kellogg*, 313.

See MORTGAGES, 5.

PLEADINGS.

1. *Admission*.—A defendant, who admits a material allegation of the complaint by his answer, and seeks to avoid it by averments of new matter, has the affirmative of the issue, and, to sustain his defense, must prove such new matter; and if he fails to do so, the averment of the complaint stands admitted. *Conner v. Reese*, 391.

2. *Usury*.—An usurious agreement must be proved as laid, and whoever desires the aid of the statutes against usury, through the interposition of the court, must make out his right to relief by allegations as well as proof. *Long Isl. and Bank v. Boynton*, 448.

3. *Parties*.—Where one who ought to have been joined dies before the judgment is rendered, and the named plaintiffs fully own and represent the cause of action, the fact of such death obviates the defect of parties, and may be proved in reply to a plea in abatement, setting up the non-joinder. *Groot v. Agens*, 558.

4. *Amendment*.—Pleadings cannot

lawfully be amended in a material respect except at a time which will give the party, against whom the amendment is allowed, a right and opportunity to meet by proof the allegations made against him. *Romeyn v. Sickles*, 594.

5. When an objection has been properly taken, or an exception presents the question, it is fatal to a recovery that it does not conform in all material respects to the allegations of the pleadings. *Id.*
6. *Secundum allegata et probata*.—It is a fundamental rule that judgment shall be "*secundum allegata et probata*," and departure from this rule is certain to produce surprise, confusion and injustice. *Id.*

See TRIAL, 5.

PRINCIPAL AND AGENT.

1. *Undisclosed*.—When a contract not under seal is made with an agent in his own name, for an undisclosed principal, whether he describes himself to be an agent or not, the agent may sue upon it. *Ludwig v. Gillespie*, 399.

NOTE ON THE RELATION AND LIABILITY OF PARTIES IN CASE OF AN UNDISCLOSED AGENCY, 401 to 413.

QUESTIONS OF FACT.

DIVORCE,
JUDGMENTS, 6.
MASTER AND SERVANT, 3.
NEGLECT, 14, 16, 17, 18.

RAILROADS.

1. *Commissioners of appraisal under contract*.—A contract was made between the petitioner and owner of land for the sale thereof, whereby it was stipulated that the commissioners appointed under the general railroad law shall in ascertaining and determining the compensation to be allowed, take into the consideration the capability of

the premises and property for any use whatever, and that they shall determine such compensation upon their own knowledge and information, as well as upon such evidence as may be produced before them. On a former appeal in this matter to the general term, the court laid down the rule that the owners were entitled to be allowed the fair market value of the property, and that this was the basis on which the estimate should be made by witnesses and the commissioners. Two of the commissioners, during the hearings, announced that they did not consider themselves bound by the supreme court decision on this point, and the petitioner made an application for their removal on the ground of misconduct in declining to be governed by the general term opinion. The court of appeals decided that, under the peculiar circumstances of this case, it could not be held to be misconduct in them to refuse to commit themselves, in advance, to a rule of decision which would exclude from their consideration matters to which it was expressly agreed they might have reference in reaching a result; especially as there is nothing in the case to show that in declining to do so, they intended to be disrespectful to the court, or arbitrarily to overrule its opinion, or to be contumacious or perverse. *Matter of N. Y. L. & W. R. R. Co.*, 79.

2. *Specific performance. Discretion of court*.—Though a passageway under a railroad was reserved by deed to be built and maintained by the company, yet, where the construction of a useful passage is difficult, and if constructed, it will be useless to the plaintiffs, it is within the discretion of the trial court, in the exercise of its equitable jurisdiction, to deny specific performance of defendant's contract to construct the passage, and leave the plaintiffs to their remedy for damages for breach of the covenant. *Murdfeldt v. N. Y. W. S. & B. Ry. Co.*, 93.

REAL PARTY.

CORPORATIONS, 2.

RECEIVER.
CORPORATIONS, 2.

REFERENCE.

1. *Compulsory*.—Where the only accounting requisite or sought in an action is to ascertain the value of property fraudulently sold, the value of its use, and, possibly, the amount of insurance realized for a part which has been destroyed by fire, but no accounting of partnership assets is asked for on either side, and none can be had, these are purely items of damage, involve no long account, and do not authorize a compulsory reference. *Morrison v. Van Benthuyzen*, 201.

SALE.

1. *Statute of frauds. Memorandum*.—Where the letters, which are sent between the parties in regard to a sale of goods exceeding fifty dollars in value, are subscribed with the exception of one postscript which contains the only reference to the price, and are so connected by their contents as together to constitute a note or memorandum of sale, they amount to a sufficient compliance with the statute of frauds, and the contract is valid. *Doughty v. Manhattan Brass Co.*, 20.
2. *False representations. Sale of stock*.—A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent misrepresentation, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made; nor is it material in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it, for his individual benefit. *Schwenk v. Naylor*, 133.

3. *Same. Examination of property*.

—The vendee in such case, though present to examine the property, has a right to rely upon the representations of the vendor as to the extent and boundary of the property, and is not bound to examine the title when the vendor professes to know all about it and the extent of the property, especially when he cannot ascertain a knowledge of these matters by an examination. *Id.*

4. *Same*.—The court of appeals refused to hold that a disputed and doubtful equitable title is equivalent to a clear and undisputed legal title, and that no damage can be sustained by the substitution of the former, for the latter, title by means of a fraud. *Id.*

SPECIFIC PERFORMANCE.

1. *Interest*.—Where specific performance is decreed, the court will, so far as possible, place the parties in the same situation in which they would have been if the contract had been performed at the time agreed upon. The vendor is regarded as trustee of the land for the benefit of the purchaser, and liable to account to him for the rents and profits, or for the value of the use and occupation, and the purchaser is treated as trustee of the unpaid purchase money, and charged with interest thereon, unless the purchase money has been appropriated, and no benefit has accrued from it to the purchaser. *Bostwick v. Beach*, 451.
2. *Deterioration of land*.—The vendor is chargeable, in such case, with the damages caused by deterioration of the property through his mismanagement and neglect. *Id.*

See RAILROADS, 2.
VENDOR AND PURCHASER, 1.

STATUTE OF FRAUDS.

CONTRACTS, 7.

SUPERIOR COURT.

JURISDICTION, 1.

TRESPASS.

Contractor.—Where a railroad company lets the contract to construct its road through plaintiff's premises to contractors, and it does not appear that such contract could not have been executed without any interference with the land on which the alleged trespass was committed by such contractors, the company cannot be said to have caused the trespass and is not liable for it. *Murdfeldt v. N. Y., W. S. & B. Ry. Co.*, 93.

TRIAL.

1. *Charge to jury. When harmless.*—In determining whether propositions of a charge, which have been excepted to as erroneous, constitute errors for which the judgment below must be reversed, the appellate court must also consider whether the verdict could have been affected or influenced by such errors; and if the verdict was not influenced by them, the judgment will not be reversed. *Phillips v. Taylor*, 9.
2. *Question for the jury.*—Where the evidence as to a waiver of the agreement to ship promptly, on the part of the defendant, is not conclusive, but conflicting, the question is properly submitted to the jury. *Id.*
3. *Action for accounting. Settlement. Question of fact.*—Where, in an action for an accounting, defendant claims that he has made settlements with plaintiff by giving her promissory notes, and it does not appear that he has rendered any account of the items of moneys in his hands or demands due the plaintiff at the time of the alleged settlements, and the proof shows that he admitted at different times certain amounts which he owed the plaintiff, and that he gave his promissory notes therefor, and it was found by the referee that he was indebted to the plaintiff for an amount far exceeding the sums named in said notes, the referee did not err in not giving legal effect to the settlements, or permitting them to be opened without charge or proof of fraud

or mistake, and the most that can be claimed is that a question of fact was presented as to whether any settlements had taken place. *Eno v. Defendorf*, 157.

4. *Separate trial.*—The right of the prosecution to try a prisoner separately is fixed by statute, and no error was committed in directing the prisoner to be tried separately from the others indicted with him. *People v. Clark*, 162.
5. *Issue. Not raised by pleadings.* The defendant is not called upon to meet and answer a cause of action, not only absent from the pleadings, but entirely inconsistent with their allegations. *Third Nat. Bk. v. Cornes*, 167.
6. *Nonsuit.*—Where it cannot be said, as matter of law, what a prudent and reasonable person would have done in circumstances similar to those in which the intestate was placed, a jury alone can determine what was his duty, and how far it was performed, and the court would err in granting a nonsuit. *Sherry v. N. Y. C. & H. R. R. Co.*, 319.
7. *Charge. Duty of counsel.*—Where the fair import of a charge, taken as a whole, is in accordance with the law, but there is a doubt as to the meaning thereof, and a possibility of the language being construed too broadly by the jury, it is the duty of the complaining party to call the attention of the court to the real error, and not simply take a general exception. *Cumming v. Brooklyn City R. Co.*, 345.
8. *Charge. Exception.*—The reply of the court to a request to charge, "it is unnecessary, I think, as my charge covers it," is a clear intimation to the jury that the request is proper; and, in case the charge does substantially cover it, an exception to such response of the court will not lie. *Schwinger v. Raymond*, 395.
9. *Charge. Abstract proposition.*—The court may properly refuse to charge an abstract proposition, though correct in substance, which

is unnecessary and immaterial. *M. & T. Bk. v. Koch*, 415.

10. *Question for the jury*.—Where two contracts have been proven, upon either of which the payment might have been intended to apply, and upon one or both of which it must have been applied, the question of application, under proper instructions from the court, should have been submitted to the jury; and a direction of a verdict for the plaintiff, in such case, was error. *Blair v. Lynch*, 439.

TRUSTEE.

Title by acquiescence.—The transfer of shares of capital stock of a corporation by a trustee, and claim of ownership by the assignee for a number of years, known to all the beneficiaries at the time of such transfer and since, together with the lapse of time, negligence in asserting the right and acquiescence in the assignee's claim unexplained, afford conclusive proof of the acquisition of a good title by the assignee, and sufficient to defeat an action to compel a transfer of such stock by the assignee's administrator to the trustee. *Lockwood v. Brantly*, 187.

VENDOR AND PURCHASER.

1. *Specific performance*.—Where a vendee agrees to purchase real estate of the vendor, with knowledge that the latter holds it under a will subject to the testator's undischarged debts, and to take a deed of bargain and sale, with covenant against the vendor's own acts, by reason of which the price to be paid is seriously reduced, the plaintiff, on refusal to accept such deed when tendered, is put in default, and cannot maintain an action for specific performance, or ask compensation for defect of title, though a subsequent stipulation was entered into, that the vendee might reject the deed, and if he did so, and the vendor chose to sue him for the purchase money, and succeeded in the action, the interest was to be waived until the date of the decision. *Emrich v. White*, 62.

2. *Title. Reasonable doubt*.—No fair, reasonable or just doubt is thrown upon the title to premises, where a clear title from the early governors of New York down to the present time with a continuous possession from 1836 to 1866, and no evidence of any possession since that time by any one adverse to this paper title, is shown. *M. E. Church Home v. Thompson*, 564.

3. *Same. Recover back purchase money*.—To maintain an action to recover the amount paid on account of a contract for the purchase of certain real estate, it is not necessary, it seems, to show an absolutely bad title. A reasonable doubt as to the vendor's title, such as to affect the value of the property, and to interfere with the sale of the land to a reasonable purchaser, will sustain the action. This rule obtains as well where the vendee sues to recover back the price paid, as when the vendor sues to compel performance. *Id.*

See CONTRACTS, 7.

WATERCOURSE.

A watercourse, as defined in the law, means a living stream, with defined banks and channel, not necessarily running all the time, but fed from other and more permanent sources than mere surface water. *Jeffers v. Jeffers*, 546.

WITNESSES.

1. *Refusal to testify*.—The refusal of a party, in a civil action, to be sworn as a witness, when confronted by a strong case of circumstantial evidence, goes far to overthrow the presumption of innocence to which he would otherwise be entitled, and which might solve a doubtful case in his favor. *N. Y. & B. Ferry Co. v. Moore*, 52.
2. *Credibility*.—While a court is bound to believe a disinterested, unimpeached, uncontradicted witness who gives evidence not in any way discredited, or in itself improbable or incredible, it is not

bound to give credit to a witness who is interested in the result of the action, and whose evidence is improbable, and discredited by circumstances, or is against common experience and observation. *Id.*

3. *Cross-examination.*—How far the cross-examination of a prisoner, as a witness on the trial, may be carried, is necessarily very much in the discretion of the court. *People v. Clark*, 182.

4. *Examination of witness.*—The trial court, upon a criminal trial, may, in its discretion, after a witness has detailed the incidents of the transaction without interruption, permit the district attorney to call his attention to the particu-

lar facts, in case it carefully guards and protects the legal rights of the defendant in the examination. *People v. Druse*, 182.

5. *Credibility.*—A party, by calling his adversary as a witness, is not forced to admit as true every fact to which he testifies. Though not at liberty to impeach his character for truth, he may dispute specific questions sworn to by him; and the trial court has a right to confront the statement of his mental conclusion with the facts and circumstances of his conduct, his letters and declarations, and determine, from the whole evidence, the issues involved. *Cross v. Cross*, 572.

See EVIDENCE, 23, 24.

64. G. A. A.

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